



May 27, 2020

Sheriff Daron Hall  
Members, Executive Committee  
National Sheriffs' Association  
1450 Duke Street  
Alexandria, VA 22314

Re: Sheriffs' Constitutional Obligations to Decarcerate During the COVID-19 Outbreak

Dear Sheriff Hall & Members of the Executive Committee:

The spread of COVID-19 is a [public health emergency](#) that is especially urgent for the 631,000 individuals who are locked in local jails. The cramped conditions and poor hygiene within jails are [already causing](#) COVID-19 to spread like [wildfire](#)—and the consequences will be devastating for both the incarcerated people in your “care and custody,” as well as for the staff across your department who are coming in and out of facilities as part of their regular job function.

In this context, immediate decarceration is both a humanitarian *and* a legal imperative. The Fifth, Fourteenth, and Eighth Amendments impose binding obligations on sheriffs, demanding that detention facilities meet the basic needs of individuals who are incarcerated and avoid posing a “substantial risk of serious harm.” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). We believe that COVID-19, given its lethality and particular mechanism of transmission, makes it difficult and potentially impossible for incarcerated people and staff to fulfill these requirements while maintaining the incarceration levels that exist now.

We know that your members are deeply committed to protecting those individuals who are being detained pretrial, serving criminal sentences, working in jail facilities, or living nearby. Jails are highly connected to their surrounding communities and, therefore, must be part of any solution that will prevent community spread of COVID-19. We look forward to working together as you pursue these decarceral goals.

### **Overview of Background Law**

When a local jurisdiction elects to detain an individual, the Fifth, Fourteenth, and Eighth Amendments impose obligations on the government actors who maintain this detention.

Government actors violate the Eighth Amendment when they “ignore a condition of confinement that is *sure or very likely to cause serious illness and needless suffering* (emphasis added)”—even if it is “not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed.” *Helling v. McKinney*, 509 U.S. 25, 33 (1993). The state has an “affirmative obligation to protect [forcibly confined] inmates from infectious disease.” *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996).

The Due Process Clause of the Fifth and Fourteenth Amendments requires that incarcerated individuals have living conditions that are reasonably safe and do not create a severe risk of death, pain, or permanent, severe injury. These Due Process rights, which fully apply to individuals detained pretrial, “are at least as great as the Eighth Amendment protections available to a convicted prisoner.” *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983) (where the institution was found liable for not providing life-saving medical care).

Correctional facilities found to have violated the Fifth, Fourteenth, or Eighth Amendment rights of incarcerated individuals can frequently be—and frequently are—held accountable through the courts. In the past, where deaths or serious injury resulted from constitutional violations, juries have routinely awarded victims millions of dollars.<sup>1</sup> As the following section explains, we believe that inmate deaths during the COVID-19 pandemic—given the overwhelming amount of expert evidence that such deaths are bound to occur—will produce similar sorts of judgments.

### **Application to the COVID-19 Crisis**

COVID-19 represents exactly the kind of dangerous condition that these Fifth, Fourteenth, and Eighth Amendment provisions were designed to address.

Medical professionals across the United States have stated that COVID-19, once introduced to correctional facilities, will “[spread like wildfire](#)” to the inmates, the staff, and the broader community. Across America, jails and prisons have [35,800 confirmed cases and 345 coronavirus-related deaths](#) of incarcerated people and staff. On Rikers Island, the main jail in New York City, the COVID-19 infection rate is [eight times higher](#) than in New York City—which already leads the nation in coronavirus infections.

The Center for Disease Control and Prevention recommends a number of practices that can mitigate the spread of infection, including: frequent handwashing; use of hand sanitizer; frequent disinfection of communal surfaces; and “social distancing” measures, which includes six-foot distances between people and an end to group gatherings that are more than ten people.<sup>2</sup>

None of the recommended measures for mitigating the spread of COVID-19 are available for people who are confined in jails. The facilities are congregate environments, forcing people into close proximity<sup>3</sup>, and

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<sup>1</sup> See *Thomas v. Cook Cty. Sheriff's Dept.*, 588 F.3d 445 (7th Cir. 2009) (upholding a \$4 million damages award from a jury trial for the Cook County Jail’s failure to treat an inmate who died of pneumococcal meningitis while in jail pretrial); *Gibson v. Moskowitz*, 523 F.3d 657 (6th Cir. 2008) (upholding \$5 million damages award from a jury trial for the wrongful death of a state prison inmate who died of dehydration); *Mombourquette ex rel. Mombourquette v. Amundson*, 469 F. Supp. 2d 624 (W.D. Wis. 2007) (resulting in a \$13.1 settlement after a pretrial detainee in county jail suffered permanent brain damage after attempting suicide); *Woodson v. City of Richmond, Virginia*, 88 F. Supp. 3d 551 (E.D. Va. 2015) (resulting in a \$3 million settlement from the city of Richmond, as well as an undisclosed amount from the Sheriff’s Office, after an inmate in the city jail suffered a heatstroke causing permanent mental and physical disabilities).

<sup>2</sup> *How to Protect Yourself*, Centers for Disease Control (Mar. 18, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prepare/prevention.html>; see also sources cited *supra* notes 1 & 2.

<sup>3</sup> The highest known person-to-person transmission rate for COVID-19 to date took place in two other congregate environments: a skilled nursing home facility in Kirkland, Washington, and on afflicted cruise ships in Japan and off the coast of California.

many are overcrowded.<sup>4</sup> Moreover, jailed individuals are disproportionately likely to suffer underlying health conditions—including asthma, diabetes, and hypertension—that place them at elevated risk during this COVID-19 pandemic.<sup>5</sup> Because of these issues, jail facilities become “ticking time bombs” where many people are crowded together “often suffering from diseases that weaken their immune systems” and “form a potential breeding ground and reservoir for diseases.”<sup>6</sup> This scenario represents a “public health disaster” that will devastate the incarcerated community *and* further overwhelm local hospitals.

Mitigation measures are insufficient to address this risk. Corrections and medical experts recognize that the only way to minimize the harm that will be done by COVID-19 is through “thoughtful downsizing of the incarcerated population” alongside “aggressive, responsive prevention measures that are developed and guided by public health and medical experts.” *Banks v. Booth*, No. 1:20-cv-00849, 2020 WL 1914896, Stern Decl. (D.D.C. Apr. 19, 2020). According to Dr. Jonathan Giftos, former Medical Director for Correctional Health Services at Riker’s Island, “the only way to really mitigate the harm... is through depopulation, releasing as many people as possible” including a focus on those who are highest risk.<sup>7</sup> Other medical experts agree that “[a]uthorities should release those who do not pose an immediate danger to public safety, while also reducing arrests and delaying sentencings.”<sup>8</sup>

Major organizations—including the undersigned groups—have begun bringing lawsuits that use these Fifth, Fourteenth, and Eighth Amendment protections to challenge detention conditions during this COVID-19 pandemic.<sup>9</sup> These lawsuits will likely continue and increase throughout the COVID-19 pandemic, particularly if sheriffs and local policymakers do not take the decarceral actions necessary to address this public health emergency. While current lawsuits have focused on decarceration and mitigating actions, future lawsuits may involve damages claims over lives that were lost due to COVID-19 outbreaks within detention facilities. We urge all sheriffs to pursue the swift, bold decarceral actions included in this memo.

## **Policy Recommendations**

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<sup>4</sup> See Richard Opiel, “A Cesspool of a Dungeon: The Surging Population in Rural Jails,” *New York Times* (Dec. 19, 2020), <https://www.nytimes.com/2019/12/13/us/rural-jails.html>.

<sup>5</sup> See *Are You at Higher Risk for Severe Illness?*, Centers for Disease Control (Mar. 20, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html>.

<sup>6</sup> See Saint Louis University, “*Ticking Time Bomb*”: *Prisons Unprepared For Flu Pandemic*, *Science Daily* (2006), <https://www.sciencedaily.com/releases/2006/09/060915012301.htm>.

<sup>7</sup> *Recipe for disaster: The spread of coronavirus among detained population*, MSNBC (Mar. 18, 2020), <https://www.msnbc.com/all-in/watch/-recipe-for-disaster-the-spread-of-coronavirus-among-detained-populations-80947781758>.

<sup>8</sup> Josiah Rich et al., *We must release prisoners to lessen the spread of coronavirus*, *Wash. Post* (Mar. 17, 2020), <https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-lessen-spread-coronavirus/>.

<sup>9</sup> On April 3, 2020, Civil Rights Corps, Loevy and Loevy, the MacArthur Justice Center, and the Chicago Community Bond Fund filed a federal class action lawsuit against the sheriff of Cook County jail, alleging that current jail conditions constitute a violation of plaintiffs’ Fourteenth Amendment rights.<sup>9</sup> On April 4, 2020, Civil Rights Corps, Community Justice Project (Miami), Dream Defenders (Miami), and Advancement Project filed a federal class action against Director of the Miami-Dade Corrections and Rehabilitation Department, alleging that current jail conditions constitute a violation of plaintiffs’ Eighth and Fourteenth Amendment rights. On April 9, the ACLU, the ACLU of Texas, The Next Generation Action Network Legal Advocacy Fund, Civil Rights Corps, and Susman Godfrey L.L.F. filed a lawsuit against Dallas County and Sheriff Marian Brown, asking that they release the most vulnerable jail inmates. And on April 21, Civil Rights Corps filed a lawsuit against Prince Georges County, alleging that their Department of Corrections has not done enough to protect inmates against COVID-19.

Our organizations agree fully with the policy recommendations that are contained in the [Open Letter to the National Sheriffs Association](#). In brief, though, we urge all sheriffs to engage local actors—including courts, county commissioners, and potentially chiefs of police—to:

- End enforcement of low-level offenses by deprioritizing or completely suspending enforcement of such offenses (including but not limited to public order offenses, drug offenses, offenses arising from behavioral health crises, and violations of COVID-19 related restrictions).
- Stop all new arrests and detentions, except where law enforcement can justify in writing that the government interest in arrest and detention outweighs the *extreme mortality and infection risk of spreading COVID-19 within correctional facilities*. Designate many offenses, including any offenses related to nonpayment and violations of COVID-19 related restrictions, as *categorically ineligible for arrest and detention*.
- End the enforcement of warrants that are for unpaid fines or fees; failures to appear; and driving on a suspended license where the underlying reason for suspension was nonpayment.
- Use cite-and-release for all individuals who are eligible for cite-and-release. When using cite-and-release, law enforcement must take the necessary precautions to ensure they are protecting themselves and the communities they serve, that includes but is not limited to wearing masks and gloves.
- Institute a release protocol for all people who are detained pretrial and post-conviction. Ensure that such protocol includes (1) immediate, categorical release for *as many people as possible* and (2) a swift, public health-conscious process that facilitates the release of individuals who are *not* within these broad categories.
- When developing broad categories for immediate release, ensure that these categories include *at minimum* the following:
  - The elderly and medically vulnerable, including individuals who are pregnant or who have asthma, chronic illness, diabetes, lung disease, heart disease, or any condition that suppresses the immune system;
  - All individuals being held pretrial unless a judge makes a finding that the individual presents a risk of serious, imminent harm to a reasonably identifiable person or extreme risk of intentional flight;
  - All people serving misdemeanors and selected cases of felony offenses;
  - All individuals within six months of their release date;
  - All primary caregivers;
  - All people held on a probation or parole-related detainer, or a technical supervision violation; and
  - All individuals being held for other agencies, including ICE.

In this extraordinarily challenging time, we know that sheriffs are deeply concerned about protecting their inmates, employees, and broader communities. We look forward to working with sheriffs nationwide to pursue these much-needed decarceral strategies.

Sincerely,

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Shay Farley, Interim Deputy Policy Officer for the Southeast, Southern Poverty Law Center  
Paige Fernandez, Policing Policy Advisor, American Civil Liberties Union