

RE: COVID-19 and the Criminal Justice System

Dear [decisionmaker],

As COVID-19 continues to spread across Maine and the United States, we are grateful to you and all public and private actors taking urgent action to combat this pandemic. We urge you to continue developing and implementing policies that align with guidance from public health experts, to minimize the harm inflicted on people involved in the criminal legal system and, by extension, the harm inflicted on broader communities. Like other public agencies, all aspects of the criminal justice system—from policing and pretrial through sentencing, confinement, and release—will be scrutinized in the coming weeks and months for how the system responds to this national public health crisis.

As you develop measures to keep the public safe, we encourage you to consider the following recommendations. We know that many of them are already under active consideration, and some of them have already been implemented in parts of the state. We hope that this letter reinforces their importance. The ACLU of Maine is available to serve as a resource as you navigate this unprecedented time.

As you likely know, dozens of public health experts and groups have clearly stated that preventing the harm inflicted by 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 at home, can drastically limit a person's ability to exercise medically recommended precautions or to seek medical help.

Further, a large number of people in our prisons and jails are older adults or are people with serious chronic medical conditions—such as heart disease, lung disease, or diabetes—that put them at higher risk of contracting and getting very sick from COVID-19.

While immediate medical attention should be sought for anyone exhibiting symptoms of COVID-19, excellent personal hygienic practices and physical distancing are the most effective tools to combat the spread of the virus. Yet effective physical distancing is practically impossible in our jails and prisons. Every person held in jail and charged with a crime comes in close contact with other incarcerated people and requires visits by criminal defense attorneys, contact between those attorneys and prosecutors, and hours of work by judges and court staff.

For all these reasons, it is vitally important that we take steps to minimize the number of people in our jails and prisons. 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, is the best way to keep our jails, our courts, and our communities safe.

Below is a non-exhaustive list of recommended actions to reduce the number of people entering the criminal legal system over the next several months. We ask you to continue working with public health experts to develop and publish immediately actionable steps to ensure that public safety and health are as protected as possible. Partnership and transparency across the system are crucial. We all have an important role to play.

Police have the power to drastically limit the number of people who are arrested and then detained, even if just for a short time. Subjecting people to custodial arrest means placing them in close proximity to other people, in spaces where maintaining hygiene is difficult. Law enforcement officers in Maine have the authority to issue a summons for a criminal offense, allowing people to remain at home until such time as they can safely appear at court to answer the charge. 17-A M.R.S. § 15-A. Police should dramatically expand their use of this authority in lieu of arrest so that people can return home, balancing any need for arrest with the overwhelming public safety concerns presented by coronavirus and the risk of bringing someone who may have the virus into a station where they might infect personnel, first responders, or bail commissioners. Police departments should make it clear to officers that arrest numbers will not be used to evaluate officer performance.

Apropos of this suggestion, we have learned that the majority of individuals brought in for arraignment on March 17 in Cumberland County were arrested and taken into custody for technical (noncriminal) violations of conditions of release; only one of the people awaiting arraignment was arrested for a violent crime. This report is consistent with our pre-COVID-19 research, which found that noncriminal violations of conditions of release was one of the most common reasons for arrest in every county in the state. We recognize that implementing big changes to the status quo is not easy, but doing so is critical at this time.

Bail Commissioners who make the initial determination concerning bail and conditions of release have the ability to ensure that people spend no more time than necessary in jail, and they must be especially attentive to the constitutional imperative not to impose bail that is beyond a person's ability to pay. Cash bail should be used as a last resort; so long as court dates are not taking place, the use of bail to secure someone's appearance at court is not the highest priority. Moreover, there are no scientific studies that support the idea that cash bail ensures a person's appearance at court when court *is* in session. And, during these economically challenging times when many people are unable to work due to business and school closings, we should be lessening financial burdens wherever possible in order to ensure the security of Maine families.

Prosecutors are vested with enormous discretion regarding the processing of people accused of crimes; the exercise of this discretion must take into account the public health implications of charging and bail decisions. Prosecutors can reduce the number of people in jails or in other confined facilities by drastically reducing their requests for pretrial detention and carceral-based sentences. The steps taken by District Attorney Natasha Irving, in a memorandum dated March 13, 2020, are a good start, and we urge other District Attorneys to publish similar updates detailing their ongoing efforts in this area.

As to pre-trial detention, the Maine Bail Code is intended to ensure “the least restrictive release alternative” that will ensure appearance in court and “reasonably ensure the safety of others in the community.” 15 M.R.S. § 1002; *see also* 15 M.R.S. § 1026. Under this authority, prosecutors should consider asking for people awaiting trial to be released 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. At the very least, prosecutors ought to investigate a person’s ability to pay—consistent with a person’s current income and financial obligations—and to take that into serious consideration, in compliance with recent legal precedents. With a special focus on populations that the CDC has identified as particularly vulnerable, prosecutors should also institute a review-and-release protocol for situations in which bail was sought and imposed over the past 30 days. *See, e.g.*, 15 M.R.S. § 1026(3)(C) (allowing amendment of bail for changed circumstances).

Prosecutors should consider immediately dismissing all cases involving minor offenses, using the legislature’s guidance about offense levels as a starting place.

People who do not pose a threat to the safety of our communities do not need to be in jail; in fact, lowering the number of people in our courts and jails is a paramount safety measure during this outbreak.

When seeking a plea or requesting a sentence, prosecutors should view incarceration into cramped and often un-hygienic facilities as a last resort. In addition, prosecutors should 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.

We were strongly encouraged by the announcement from the courts on March 16 vacating financial-based warrants for arrest. We believe that even more is required: prosecutors ought to work with the courts and the Governor to vacate all outstanding fines and fees; at a time when so many will be facing unprecedented financial hardship, Mainers need to be able to use the money they would have paid to the state to instead take care of themselves and their families.

Judges have the ultimate decision-making authority in our criminal justice system, and they have a responsibility to ensure that the recommendations highlighted above are followed. We applaud the Court for vacating all outstanding warrants for unpaid fines and

fees and failure to appear. This type of action is necessary to ensure we are protecting all members in our community.

Judges have the responsibility of ensuring that courthouses remain both accessible and safe for people whose cases are currently pending. They should remember that measures that are reasonable in the short term may, in the longer term, needlessly prolong people's cases and exacerbate the stigma and harm associated with having an open criminal case. For example, the Judicial Branch recently issued an order postponing all in-person court events, with limited exceptions such as initial appearances and bail hearings for in-custody defendants. For any cases that the court does continue, judges must remain mindful of defendants' rights to a speedy trial. In some cases, dismissal of charges is the appropriate remedy for a defendant who has been effectively denied their day in court.

In addition, it would be helpful if the judicial branch clarifies the types of cases that are and are not being heard, and publicizes additional schedules and guidance for the public. For example, late on Monday, March 16, we learned that a litigant in a family matter in Lewiston was uncertain whether her matter would still be heard the next morning at 8:30 a.m. After analyzing her case type in light of the judiciary's order, one of our attorneys was also uncertain. He advised her to drive to the court and call the clerk from the parking lot. She took the advice. When the client called the court, the clerk herself was uncertain, and said the case fell into a "gray area." This client is an immune-compromised mother, whose family depends on her for childcare, food, and other necessities.

As the courts take big steps forward to reduce the risks associated with physical contact, they should also consider taking comparatively easy steps that can help limit risk. This includes issuing an emergency order allowing (but not requiring) attorneys to file motions and other filings by email, reducing the need for attorneys to submit them in-person and expose the attorneys and court staff to additional risk.

Sheriffs have the authority to protect the people who are, or who will be, incarcerated even after the recommendations discussed above are put into action. Most importantly, sheriffs can ensure that facilities are as empty, safe, and clean as possible. This means sanitizing facilities and coordinating with local public health experts to ensure 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.

Sheriffs should 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. In addition, housing and caring for people who are exposed to the virus, who are at high risk of serious illness, or who screen or test positive for COVID-19, should *not* result in prolonged, widespread lockdowns.

We understand that Maine sheriffs are already in the process of assessing detained and incarcerated populations for immediate release, and we applaud this effort. Sheriffs should purposefully exercise their authority to release people who have served at least 1/3 of their term of imprisonment, *see* 30-A M.R.S. § 1659-A, as well as their authority to issue a furlough of longer than three days (without any limitation) “to provide treatment for a physical or mental condition[.]” 30-A M.R.S. § 1556(1). This authority must be interpreted broadly in light of the current state of emergency, to include release of individuals who are particularly susceptible to the coronavirus. For anyone who is being released, sheriffs should 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.

Sheriffs should 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.

Finally, sheriffs should implement procedures to allow programming and communication 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. Because in-person visitations by family have been, or will likely be, limited in all facilities, it is critically important that barriers to other forms of communication be lifted. For example, jails cannot simply ban in-person contact without making alternative avenues available, such as video visitation. By statute, if in-person visitation becomes unsafe, the jail, “on a short-term basis only, may restrict all visitation at the jail to video-only visitation.” 30-A M.R.S. § 1556-A (emphasis added). There is no authority to remove visitation entirely. Further, voice calling should be made free for all incarcerated people. And criminal defense lawyers will have even more difficulty keeping in touch with their clients, so jails need to do everything they can to facilitate attorney meetings as well.

Officers Supervising People on Community Confinement can and should 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 physical distancing, and should allow check-ins to occur by voice or video call. Where those technologies are not accessible to a person under supervision, check-in requirements should be minimized or temporarily suspended. Additionally, agents should suspend enforcement of any mobility-restricting supervision conditions that impede a person’s ability to seek medical care or to support a loved one with COVID-19. Finally, we can

reduce the number of incarcerated people by suspending detainers and incarceration for technical (crimeless) conditions violations. Violation of conditions of release is among the most common offenses that defendants are charged with in every Maine jail.

Governor Mills has a uniquely powerful role to play in limiting the harms of COVID-19 by decreasing incarcerated populations and creating a culture in which transparency, safety, and the health of all people are the paramount concerns. **We ask that Governor Mills consider granting immediate commutations to anyone whose sentence would end in the next year, to anyone currently being held on a technical (crimeless) condition violation, and to anyone identified by the CDC as particularly vulnerable whose sentence would end in the next two years. See Me. Const. Art. V, § 11.**

Also, under her broad emergency authority, we ask that Governor Mills mandate that 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 and access to medical facilities and services.

Finally, we believe that Governor Mills has the authority to implement many of the remedies suggested above through executive order, under both her broad constitutional authority as well as her emergency authority. Doing so will help ensure consistency throughout the state, which is an important pillar of our justice system.

In conclusion, the urgency of deliberate and thoughtful action cannot be overstated. We are all stronger when we rely on the wisdom of the many instead of the few, and we hope this letter can serve as a part of that effort. In addition, we urge you—and government at all levels and in all branches—to provide opportunities for input from stakeholders and other affected people. For the criminal justice system, that should include soliciting feedback from people who are incarcerated, litigants, families, attorneys, and employees. Stakeholders and other affected people can contribute creative ideas to protect the safety of our community as a whole.

We are grateful for your consideration of the above recommendations as you develop measures to keep the public safe. These are unprecedented times and will require all of us working together to ensure a fair and effective response. We are eager to work with, and to serve as a resource for, anyone who is considering the steps outlined above. Together, we will come out of this a stronger state.

Very truly yours,

Alison Beyea,
Executive Director