



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Alaska

March 18, 2020

The Honorable Mike Dunleavy, Governor
via electronic submission to
<https://aws.state.ak.us/CrmForms/Home/Feedback>

Chief Justice Joel Bolger
825 W 4th Ave.
Anchorage, AK 99501

RE: COVID-19 and Alaska's Criminal Justice System

Dear Governor Dunleavy and Chief Justice Bolger,

I write to you as the key policymakers and administrators of Alaska's criminal legal system at a moment when our state has confirmed six cases of novel coronavirus disease 2019 (COVID-19) and is bracing for more. As the virus that causes COVID-19, severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), continues to spread across the United States, and as more public and private actors take drastic steps to combat this pandemic, **the American Civil Liberties Union of Alaska urges you 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 this system – from policing and pretrial through sentencing, confinement, and release – will come under intense scrutiny for their response to this national public health crisis. This letter offers a set of informed, immediately actionable recommendations for the criminal legal system, and we ask that you consider us a resource to work with and support you in implementing these and related actions. **The decisions you make can save Alaskans' lives.**

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 six feet away from someone who coughs or sneezes, avoiding or limiting all physical contact, washing your hands regularly with soap and water, and using alcohol-based hand sanitizer to clean your 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](#), [Dr. Marc Stern](#), [Dr. Oluwadamilola T. Oladeru](#) and [Adam Beckman](#), [Dr. Anne Spaulding](#), [Homer Venters](#), and [Josiah Rich](#) 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 the recommended precautionary measures or to seek medical help.** The longer jurisdictions wait to act, the worse this will be.

A look at Alaska's prison population reveals the vulnerability of those who become involved in our state's criminal legal system: four of five incarcerated individuals suffers from substance use disorders,¹ and approximately 44 percent have a diagnosed mental health issue.² It is also an aging population: between 2015 and 2019, the number of incarcerated individuals aged 60 and above increased 26.5 percent.³ We note, too, that our state's prison population also reflects systemic biases that result in incarceration of Alaska Native people at four times the rate of white individuals.⁴

Moreover, this pandemic has struck at a time when our state's prison system is dangerously overcrowded and understaffed. On October 15, 2019, the Department of Corrections (DOC) issued a press release indicating our state's corrections system was at 97 percent of its maximum capacity;⁵ we later discovered that eight facilities had exceeded their maximum

¹ Alaska Criminal Justice Commission, *2018 Annual Report* (November 1, 2018), <http://www.ajc.state.ak.us/acjc/docs/ar/2018.pdf>

² "Alaska Scorecard 2019: Key Issues Impacting Alaska Mental Health Trust Beneficiaries" (February 2020), http://dhss.alaska.gov/dph/HealthPlanning/Documents/scorecard/2019%20Trust%20Scorecard_full.pdf

³ ACLU of Alaska analysis of data reported in Alaska Department of Corrections annual *Offender Profile* reports, 2015-2019.

⁴ Alaska DOC, *2017 Offender Profile*, <http://www.correct.state.ak.us/admin/docs/2017profile.pdf>; U.S. Census Bureau, "Annual Estimates of the Resident Population by Sex, Age, Race and Hispanic Origin for the United States and States," 2017 population estimates.

⁵ "DOC Addresses Population Management" (press release), Oct. 15, 2019. <https://doc.alaska.gov/commish/pressreleases/DOC%20Addresses%20Population%20Management.pdf>

limits an average of 140 days over the previous year.⁶ Meanwhile, DOC has 93 vacancies for corrections officers⁷, causing conditions in our prisons that Randy McLellan, the president of the Alaska Correctional Officers Association, has described as “gambling with lives.”⁸ Overcrowding and understaffing undermine DOC’s ability to maintain an environment that is safe and sanitary, while exacerbating the numerous issues faced by prisoners with medical and mental health needs.

Therefore, we urge you to partner with local public health experts 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 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 that no one system actor can be held singularly responsible for addressing this crisis. Partnership and transparency across the system 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, whether the Alaska State Troopers, the Anchorage Police Department or any other local police agency, 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 cease arrests for low-level offenses and issue citations or desk-tickets in lieu of other arrests 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 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.

⁶ “ACLU Analyzes Alarming Prison Overcrowding Records from Alaska Department of Corrections” (press release), November 15, 2019. <https://www.acluak.org/en/news/aclu-analyzes-alarming-prison-overcrowding-records-alaska-department-corrections>

⁷ Presentation of the Alaska Department of Corrections to the House Finance Subcommittee for Corrections, February 4, 2020. http://www.akleg.gov/basis/get_documents.asp?session=31&docid=58217

⁸ Testimony of Alaska Correctional Officers Association President Randy McLellan to the House Finance Subcommittee for Corrections, February 4, 2020. http://www.akleg.gov/basis/Meeting/Detail?Meeting=HCOR%202020-02-04%2008:00:00#tab4_4

This use of prosecutorial discretion would have a tremendous impact: approximately half the individuals in Alaska's prisons right now are unsentenced – that is, behind bars without a conviction, often just awaiting trial – and make up an increasing share of the prison population.⁹ In the span of a single year, between September 2018 and September 2019, DOC data point to a 20 percent increase in unsentenced individuals.¹⁰ In our state's prison facilities, those awaiting trial are not segregated from sentenced inmates during their stays. Reducing pretrial incarceration would have an immediate impact on overcrowding conditions in the prison system, and would serve to limit potential disease exposure for those living and working in those facilities.

State and municipal prosecutors should therefore 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 – be doubly sure to comply with recent legal precedents in setting bail with a person's ability to pay as a paramount consideration. With a special focus on populations 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 must 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,¹¹ prosecutors should also 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. Finally, prosecutors should dismiss cases involving minor offenses, thereby limiting the amount of time a person must spend in court.

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 courthouses remain both accessible and safe for people whose cases are currently pending. Judges should 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

⁹ "ACLU Analyzes Alarming Prison Overcrowding Records from Alaska Department of Corrections" (press release), November 15, 2019. <https://www.acluak.org/en/news/aclu-analyzes-alarming-prison-overcrowding-records-alaska-department-corrections>

¹⁰ *Ibid.*

¹¹ 461 U.S. 660.

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 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.

The Department of Corrections must exercise its 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, corrections officials must 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.

Corrections officials must 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, DOC 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, DOC 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 released within the next sixty days, anyway. DOC should also 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. For anyone who is being released, 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.

Corrections officials must implement procedures to allow programming to continue; where health officials have urged limiting volunteer access to prisons, this may mean allowing staff or incarcerated people to run programs. Similarly, 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. Finally, corrections officials 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.

We note that the policies and procedures DOC has promulgated to date, including its “Infectious Disease Outbreak Clinical Care Guide” (dated March 4, 2020) and its “Instruction Bulletin: How to Respond to a Coronavirus Outbreak” (also dated March 4, 2020), conform with some but not all of the measures above.

Probation and Parole Agents 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, agents should suspend enforcement of any mobility-restricting supervision conditions that impede a person’s ability to seek medical care or to support loved on who may have COVID-19. Finally, limit the number of people being 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 Parole Board 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 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. First and foremost, Governor Dunleavy should 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 Dunleavy can mandate that the Department of Corrections, when processing these releases, is 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. Additionally, the Governor must 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. Finally, we ask that Governor Dunleavy consider issuing Executive Orders that seek to achieve the goals and remedies outlined above, particularly where local system actors are awaiting that guidance.

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, 5 million people cycle through jails every year, and there are nearly 7 million people incarcerated or under supervision in the United States. 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 commonsense 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.** Please do not hesitate to reach out with any questions or for more information. We want to ensure implementation of policies that will limit the threats presented by this public health crisis.

Sincerely,



Triada Stampas
Policy Director

cc: Department of Public Safety Commissioner Amanda Price
Attorney General Kevin Clarkson
Department of Corrections Commissioner Nancy Dahlstrom
Department of Health and Social Services Commissioner Adam Crum
Chief Medical Officer Dr. Anne Zink
Parole Board Chair Edith Grunwald
Public Defender Samantha Cherot
Office of Public Advocacy Director James Stinson
Alaska Judicial Council Executive Director Susanne DiPietro
Mayor Ethan Berkowitz, Municipality of Anchorage
Mayor Beth Weldon, City and Borough of Juneau
Alaska Correctional Officers Association President Randy McLellan
Alaska Municipal League Executive Director Nils Andreassen