

March 26, 2020

SENT VIA EMAIL



AMERICAN CIVIL LIBERTIES UNION

Nevada

Steve Sisolak, Governor of
the State of Nevada

Robin Sweet, Nevada
Supreme Court
Administrator

Christina Pickering, Chief
Justice of the Nevada
Supreme Court

Charles Daniels, Director
of the Nevada Department
of Corrections

Nevada Parole Board

Steven B. Wolfson, Clark
County District Attorney

Joseph Lombardo, Clark
County Sheriff

Ken Furlong, Carson City
Sheriff

Kenneth Elgan, Esmeralda
County Sheriff

Chris Hicks, Washoe
County District Attorney

Darin Balaam, Washoe
County Sheriff

Sharon Wehrly, Nye
County Sheriff

Aaron Ford, Nevada
Attorney General

Hon. J. Russell, First
Judicial District Court

Hon. Scott N. Freeman,
Second Judicial District
Court

Hon. John Schlegelmilch,
Third Judicial District
Court

Hon. Nancy Porter, Fourth
Judicial District Court

Hon. Kimberly Wanker,
Fifth Judicial District Court

Hon. Michael R. Montero,
Sixth Judicial District
Court

Hon. Steve L. Dobrescu,
Seventh Judicial District
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Executive Court
Administrator, Eighth
Judicial District Court

Hon. Nathan Young, Ninth
Judicial District Court

Hon. Thomas L. Stockard,
Tenth Judicial District
Court

Hon. Jim C. Shirley,
Eleventh Judicial District
Court

Assemblywoman Rochelle
Nguyen, Chair, ACJ

RE: COVID-19 and the Criminal Justice System

Dear State Leaders,

As the SARS-CoV-2 (COVID-19) strain of coronavirus continues to spread across the United States, and as more public and private actors take drastic steps to combat this pandemic, we commend the actions that have already been taken to protect Nevadans, and

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urge you to further 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, including confinement and release, will come under intense scrutiny for how the system responds to this national public health crisis.

COVID-19 is spreading exponentially across the country and across the state of Nevada. The first case in Nevada was reported on March 5, 2020. On March 12, 2020, Governor Steve Sisolak declared a State of Emergency for COVID-19.¹ As of the date of this letter, the number of people who have tested positive for COVID-19 in Nevada has risen to 420 cases, and 10 deaths.²

We believe that each of you recognizes that the COVID-19 pandemic threatens all of us, but particularly the most vulnerable, impoverished, and marginalized Nevadans. **This letter is a plea for measures based on existing law to avoid injuries, to protect vulnerable populations, and to reduce the COVID-19 exposure of government officials, those in the care of our prisons and jails, and the entire state.**

According to the Centers for Disease Control and Prevention 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 immunocompromised are at higher risk for becoming severely ill from COVID-19.³ There is no vaccine, and no uninfected person is immune. This crisis will require us to find new ways to protect the most vulnerable, preserve individual rights, and keep the wheels of justice turning.

People in prisons and jails are highly susceptible to outbreaks of contagious illnesses. They are housed in close quarters and are often in poor health. Without the active engagement of the prison or jail administration, they have little ability to inform themselves about preventive measures, or to take such measures if they do manage to learn of them.

While immediate medical attention should be sought for anyone exhibiting symptoms of COVID-19, 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 hands regularly with soap and water, and using alcohol-based hand sanitizer to clean hands after coughing, sneezing, or coming into contact with potentially exposed surfaces, objects, or people.

¹ [http://gov.nv.gov/News/Emergency_Orders/2020/2020-03-12 - COVID-19 Declaration of Emergency/](http://gov.nv.gov/News/Emergency_Orders/2020/2020-03-12_-_COVID-19_Declaration_of_Emergency/)

² <https://www.rgi.com/story/news/2020/03/26/nevada-coronavirus-cases-by-county-timeline-map/5082421002/>

³ <https://www.cdc.gov/coronavirus/2019-ncov/hcp/underlying-conditions.html>;
<https://www.who.int/news-room/q-a-detail/q-a-coronaviruses>

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Taking steps to prevent unnecessary health risks includes preventive measures by those being confined, but it also includes the workers that cycle in and out of the prisons and jails daily. Naturally, employees of the prisons and jails have various interactions within public spaces, and then return to the facilities where they are charged with having contact and interactions with those being confined. While workers may have the ability to remove themselves from a space they feel may be contaminated, those in prisons and jails have little say as to whether they want to interact or practice social distancing.

CURRENT STATUS AT NEVADA PRISONS AND JAILS

Today, we were made aware that an employee at High Desert State Prison has tested positive for the COVID-19 virus, forcing all inmates to be isolated in their cells.⁴ This prison holds approximately 4,000 inmates. This situation has the potential to have catastrophic results if changes beyond increased cleaning measures are not implemented.

We are also aware that as of March 25, 2020, there are detainees in isolation at the Henderson ICE Detention facility due to interaction with a guard that has tested positive/been exposed to COVID-19.

We do not raise this to imply that any exposure was intentional; instead, it is an important example of how this virus can spread long before an individual is aware that they have been exposed and exposed others to it.

While some Nevada prisons have been taking the temperature of employees before they enter the prison for work, that is only one factor in determining COVID-19 infection. It does little to determine if they are already infected with the coronavirus. According to the CDC, symptoms of infection may take 2-14 days AFTER exposure to appear. Those symptoms may include fever, cough, and shortness of breath.⁵ By this time, a large population of those confined may be exposed and infected, and surfaces in the facility contaminated. While most healthy adults may be able to fight the virus, we have seen more vulnerable populations with more dire outcomes.

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. Our response 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.

⁴ <https://www.kolotv.com/content/news/COVID-19-UPDATES-Area-schools-cancel-extracurricular-activities-568789201.html>

⁵ <https://www.cdc.gov/coronavirus/2019-ncov/about/symptoms.html>

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The following actions will reduce the number of people who are coming into, and remaining in, 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.



1. Arrests should be limited to only the most serious offenses.

State and local governments could reduce COVID-19 exposure for their employees and the public by aggressively limiting custodial arrests to the most serious offenses. Police and other law enforcement officers 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.

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 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, can drastically limit a person's ability to exercise any of the above precautions or to seek medical help. The longer jurisdictions wait to act, the worse this will be.

Police should uniformly practice issuing citations or desk-tickets for low-level offenses, in lieu of other arrests, so that people can return home. Low-level offenses include mere drug possession and traffic code violations absent an imminent threat to the driver or the public. This approach balances the need for arrest with the overwhelming public safety concerns presented by COVID-19 and limits the risk of bringing someone who may have the virus into a station or jail, 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. Nationally, prosecutors have publicly called for collective action to address this risk of COVID-19 in jails and detention facilities.⁶

Prosecutors should also 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 to those individuals who pose a risk of violence.

⁶ See Elected Prosecutors Call for Dramatic Reduction in Incarcerated and Detained Populations in Response to Coronavirus (Updated March 18, 2020), <https://t.co/yoFqYH4of?amp=1>.

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2. At-risk people should not be in jail absent extraordinary circumstances.

Prison and jail officials must provide for additional precautions for those who are at high risk of serious illness if they are infected, such as pregnant women and people with chronic illnesses, compromised immune systems, or disabilities, and people whose housing placements restrict their access to medical care and limit the staff's ability to observe them. The nature of the disease mandates preventative steps that are often not available to prisoners, including social distancing. Overcrowding and unsanitary conditions mean that preventative steps, such as frequent hand washing, are harder to follow. Nevada authorities must consider whether the outbreak qualifies certain prisoners for parole or early release. **Efforts should be made to release older detainees and those with certain health conditions who no longer pose a threat to public safety.**

Additionally, Sheriffs should immediately suspend holding at-risk 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.

Even without a global pandemic, many Nevada jails struggle to provide adequate medical care for a population that is already high-risk. The Nevada Department of Corrections acknowledges that many inmates suffer from preexisting conditions related to their substance abuse/addiction and mental health issues, as well as chronic medical conditions such as diabetes and hypertension.⁷ The CDC has determined that diabetes and other health factors place people at a higher risk of complications from COVID-19.⁸

To protect the health of incarcerated people due to overcrowding and to minimize exposure of Department of Corrections staff, we urge the authority to demonstrate that they are committed to providing reasonable care for prisoners through early release of those at high risk of serious illness and who pose no flight risk or threat to public safety.

3. People should not be in jail because they cannot afford bail.

Existing bail practices will increase the danger to the public and create monumental backlogs. Prosecutors should be doubly sure to comply with recent legal precedents in setting bail with a person's ability to pay as a paramount consideration.⁹ Nationally, three-quarters of jail detainees have not been convicted of a crime but remain held because they can't afford bail pending trial, according to Amber Widgery of the National Conference of

⁷ http://doc.nv.gov/About/Statistics/Inmate_Mortality_Statistics/

⁸ <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/people-at-higher-risk.html>

⁹ See, e.g., *Daves v. Dallas Co.*, 3:18-cv-0154-n (N.D. Texas Sept. 20, 2018), available at https://www.aclutx.org/sites/default/files/field_documents/preliminary_injunction_opinion.pdf; *State of New York ex rel Desgranges v. Anderson*, No. 90/2018 (New York Supreme Court for Dutchess Co. Jan. 31, 2018), available at https://www.nyclu.org/sites/default/files/field_documents/2018-01-31_decision_order_and_judgment_on_habeas_corpus_proceeding_and_action_seeking_declaratory_judgment_00061815xb2d9a.pdf.

State Legislatures. As of January 2020, Las Vegas police reported the Clark County Detention Center, with 3,100 beds, operates at or near capacity.¹⁰ The public health crisis requires that steps be taken quickly to get as many of those individuals released as possible.



When seeking a plea or requesting a sentence, prosecutors must view incarceration during the public health crisis 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. With a special focus on populations that the CDC has identified as particularly vulnerable, prosecutors should also institute a review-and-release protocol regarding cases in which bail was sought and imposed over the past thirty days.

We urge the Chief Justice and District Court judges to issue guidance to Nevada judges to ensure that no individuals remain in jail simply because they are unable to pay bail. Nevada prosecutors and sheriffs should take all steps in their power, including procedures available under NRS 178.484,¹¹ to release all people who are being held based solely on their inability to make bail.

Prosecutors can help by not arguing for punitive bond amounts, by reconsidering whether bond is even necessary, and by ordering the release of individuals without bail requirements pursuant to NRS 178.4853.¹²

Judges can help the situation by recognizing that the risk-benefit analysis used in setting bail needs to change drastically. The risks of incarcerating people have skyrocketed for everyone. The vast majority of people should be released unless they have been accused of a violent felony or there is a substantial likelihood that they will hurt somebody if they are released.

4. Courts must suspend the payment of fines and fees.

In line with the 1983 *Bearden v. Georgia* case,¹³ prosecutors and courts should temporarily suspend the collection of unpaid fines and fees so that people do not face possible arrest due to non-payment, especially at a time when many individuals and families will face enormous economic difficulty in light of anticipated high levels of job loss. It makes no sense to squander critical public infrastructure resources and risk public health to seek to recover these debts during the public health crisis.

The Nevada Board of Parole and probation and parole officers must also exercise their authority to limit the number of people who are incarcerated. Officers should limit the number of people being incarcerated by suspending detainers and incarceration for technical (crimeless) rule violations.

¹⁰ <https://news3lv.com/news/local/nevada-lawmakers-study-pretrial-release-of-jail-detainees>

¹¹ <https://www.leg.state.nv.us/NRS/NRS-178.html#NRS178Sec484>

¹² <https://www.leg.state.nv.us/NRS/NRS-178.html#NRS178Sec4853>

¹³ [Bearden v. Georgia, 461 US 660 - 1983](#)

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Nevada courts have halted eviction proceedings. Most banks and student loan companies have suspended payments due to the financial state caused by the loss of employment during the pandemic. Even Nevada utility companies have suspended disconnections for non-payment.

At a time when the country is facing a health crisis and, as a result, a financial crisis, it is nonsensical that the Nevada criminal justice system would continue to require that those on parole or probation continue monthly payments covering fees, charges for drug tests and court-ordered restitution to victims. Yet, this is still taking place in Nevada.¹⁴ If people are unable to make these payments, they risk going to jail. This action does nothing to mitigate the potential exposure within correctional facilities and doesn't acknowledge the health and economic crisis that Nevadans are facing.

5. The Nevada DOC must waive the co-pay fee charged to incarcerated people seeking medical care.

With a rapidly spreading viral infection such as COVID-19, there should be no barriers to medical treatment for those incarcerated. Many prisons in various states have announced that they will be waiving copays for inmates with cold and flu symptoms and/or respiratory, flu-related COVID-19 symptoms. However, in a recent response to the Prison Policy Initiative, Nevada Department of Corrections Public Information Officer, Scott Kelly, stated “the Nevada Department of Corrections has not and does not intend to stop collecting co-pays from patients in our institutions... Co-pays may be waived or reversed on a case-by-case basis if it's determined the need to be seen by a practitioner is due to COVID-19.”¹⁵

The waiver of co-pays should not be optional, and those incarcerated should not feel that they cannot seek treatment because of actual or potential fees. These fees should be suspended immediately.

6. Provide free phone calls, video calls, and e-mail.

Families of prisoners have expressed concern about their loved ones being at heightened risk of COVID-19. There is added concern, since Nevada prison visits have been banned for an indefinite time. While in-person visits are currently banned, it is important that people who are incarcerated can easily and regularly communicate with loved ones who are out in the community.

¹⁴ . <https://www.reviewjournal.com/crime/courts/nevadans-on-parole-probation-during-coronavirus-still-have-to-pay-fees-1988751/>

¹⁵ <https://www.prisonpolicy.org/virusresponse.html#copays>

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Current phone and video conferencing systems can be expensive. We ask that you suspend charging people for phone, video, and e-mail communications, even if the government has to absorb the cost.



7. Judges must use their authority to ensure that the criminal justice system does its part in slowing the spread of COVID-19.

Judges have the ultimate decision-making authority beyond what prosecutors may seek to achieve and should also follow the recommendations highlighted above to limit the number of people who are coming into and forced to remain in jails and prisons.

We greatly appreciate that in recent days the Court has promptly and carefully already taken some of these important steps. We applaud those judges who have rendered decisions that will protect the prison population, staff, and community. In a COVID-19 related ruling on March 17, 2020, Nevada federal court judge Robert C. Jones, noted that:

“Faced with the threat, jails and prisons have to prepare for two states: (1) before COVID-19 gets into the facility and the jail is trying to keep the virus out [and] (2) when the disease is discovered inside the facility and efforts then are made to keep the virus in.” “There is ample opportunity for a virus to enter a prison or jail, and for it to go back out into the community. Once a contagious illness enters, conditions in correctional facilities are highly conducive to it spreading. This pandemic is unprecedented in our lifetime. While measures are being taken by facilities all over the world, no facility is prepared.”¹⁶

In that case, Judge Jones granted a plaintiff’s Emergency Motion to Temporarily Modify Intermittent Confinement as a Condition of Probation Due to the COVID-19 Pandemic and to suspend his condition of probation that he present himself to the Washoe County Detention Facility for intermittent confinement.¹⁷

Additionally, Chief Justice Kristina Pickering and Chief Justice of the Peace Susan Baucum recently issued Administrative Order # 20-03, stating, in part, that any person arrested on a criminal offense subject to an own-recognition release under Las Vegas Justice Court Administrative Order 18-04, will be given a return court date in sixty (60) days.¹⁸

We implore more authorities to issue similar rulings and Administrative Orders that will help Nevada do its part in flattening the COVID-19 curve.

¹⁶ *United States v. Barkman*, 2020 U.S. Dist. Lexis 45628*

¹⁷ *Id.*

¹⁸ <http://www.lasvegasjusticecourt.us/Admin%20Order%2020-03%20Amended.pdf>

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8. The Director of the Nevada Department of Corrections and County Sheriffs must exercise their authority to protect the people who are, or will be, incarcerated even after the recommendations discussed above are put into action.

Most importantly, jails and prisons must be kept as empty, safe, and clean as possible. This means increased frequent sanitizing of facilities. This also means close coordination with state and 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.

The Department of Corrections and County Sheriffs must educate their staff and persons in their custody. People housed in the prisons and jails need to be informed about the virus and the measures they can take to minimize their risk of contracting or spreading the virus. They must be educated on the importance of proper handwashing, coughing into their elbows, and social distancing to the extent they can. Information about the spread of the virus, the risks associated with it, and prevention and treatment measures must be based on the best available science. Correctional, administrative, and medical staff all must be educated about the virus to protect themselves and their families, as well as the people in their custody.

The Department of Corrections and County Sheriffs must implement procedures to care for those who become ill from COVID-19 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 science available; increased access to medical care and removal of all co-pays; 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, jails and prisons 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 lockdowns. Any lockdowns or interruptions in regular activities, such as exercise or visits and phone calls with families or attorneys, should be based solely on the best science available and should be as limited as possible in scope and duration.

The wardens and jail administrators 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.

For anyone who is being released, consult with state and local health officials to ensure adequate screening and quarantine procedures are in place so that COVID-19 is not transmitted into the community from within the facility.

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Finally, wardens and sheriffs 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.

9. The Governor should exercise his power to reduce the risks of COVID-19 in correctional settings.

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, the Governor 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, the Governor can mandate that Sheriffs who are processing these releases coordinate with local service providers and public health experts so that people released have a safe and accessible place to return to that is also close to medical facilities and services they may need. Additionally, the Governor needs to mandate data collection and distribution from all criminal legal system agencies and actors who are part of the state's COVID-19 response, as sharing information about this virus is essential in limiting the damage it will cause. The Governor must also consider issuing Executive Orders that seek to achieve the goals and remedies outlined above, particularly where local system actors are awaiting that guidance.

We commend the Governor for the swift actions that he has taken in closing the schools and non-essential businesses. We hope that he continues to use his authority to protect against the exposure, spread and possible fatalities that could occur if COVID-19 enters the prison facilities.

IN CLOSING

In closing, it is essential to remember actors within the criminal legal system must coordinate with and defer to state and 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 our national response to the SARS-CoV-2 (COVID-19) pandemic must maintain a focus on these populations. There is also 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. If you have questions or would like to discuss these recommendations further, please contact Sherrie



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Royster, ACLU of Nevada legal director, at royster@aclunv.org , and/or Holly Welborn, ACLU of Nevada policy and advocacy director, at welborn@aclunv.org.

Sincerely,



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