

STATE OF VERMONT

VERMONT SUPERIOR COURT

WINDHAM CRIMINAL DIVISION
DOCKET NO. 263-3-18 Wrcr

STATE OF VERMONT

v.

FRANK SANVILLE

**MEMORANDUM OF AMICI CURIAE THE NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS ET AL.**

This memorandum is submitted by the National Association of Criminal Defense Lawyers and the American Civil Liberties Union Foundation of Vermont in support of the positions of the moving parties in these consolidated matters set for an evidentiary hearing on April 21, 2020.¹

INTEREST OF AMICI

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.² NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors,

¹ While captioned as to the lead case, Amici intend for this memorandum to apply to all of the consolidated cases.

² No party or counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the United States Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL's dedication to the fair administration of justice enables us to provide additional, and specifically constitutional, analysis for the Court.

NACDL has an interest in the instant matters because the continued detention of individuals in Vermont's jails during the deadly COVID-19 pandemic would not only harm public safety, but also violate the due process rights of those inmates under the Fifth and Fourteenth Amendments, and the Eighth Amendment prohibition on cruel and unusual punishment. Court intervention that would allow for the release of inmates in light of the unprecedented health and safety concerns COVID-19 presents also furthers NACDL's mission to restore rationality and humanity to our criminal justice system.

The ACLU Foundation of Vermont ("ACLU-VT") is a statewide nonprofit, nonpartisan organization with more than 10,000 members and supporters dedicated to the principles of liberty and equality embodied in the constitutions and laws of Vermont and the United States. It is the Vermont affiliate of the American Civil Liberties Union, a nationwide nonpartisan organization with over 1.5 million members. The ACLU-VT is dedicated to protecting the individual rights and liberties embodied in the state and federal constitutions, and has a longstanding interest in

preserving the rights of individuals involved in the criminal justice system, including pretrial detainees because the organization strongly believes in the principle that individuals are innocent until proven guilty.

The ACLU-VT's interests in the instant matters revolve around the serious danger posed by the COVID-19 virus to individuals held in Vermont's prisons. As argued in this memorandum, the U.S. Constitution and Vermont law require that pretrial detainees be released from prison facilities because imprisoning them amidst a pandemic in facilities that are inherently incapable of preventing the spread of this highly communicable disease constitutes excessive and unlawful punishment under the Due Process Clauses of the Fifth and Fourteenth Amendments. Before and during the COVID-19 crisis, the ACLU-VT, along with the Council of State Governments and other partner organizations, has been actively advocating for the use of "smart justice" strategies to quickly reduce the number of individuals in Vermont's prisons. The ACLU-VT's ongoing and longstanding legal and policy advocacy regarding the due process rights of pretrial detainees enables it to provide the Court with additional valuable information for its deliberations.

FACTUAL BACKGROUND

I. The COVID-19 Pandemic Is of Unprecedented National and Global Significance, Necessitating a Drastic Local Response

The moving parties have fully briefed the factual background in their motions and petitions. As such, and assuming that the Court is well aware of this factual background and will hear testimony from a top expert, Dr. Jaimie Meyer, directly at the

consolidated evidentiary hearing on these motions, this memorandum will only broadly highlight the factual points most relevant to the positions contained herein.

The issues presented by the moving parties are of national and global importance. The COVID-19 pandemic has rapidly affected all aspects of human life. In the forty-two days since the World Health Organization (“WHO”) officially characterized COVID-19 as a pandemic, nearly every aspect of society has been flipped upside down; global, national, state and local leaders have had to make difficult decisions and implemented various protocols to save lives from a deadly and highly communicable disease.

In Vermont, Governor Phil Scott issued an executive order on March 13, 2020 that declared a state of emergency and implemented a number of public health measures. Governor Scott has since issued a number of orders and made announcements related to COVID-19 and the State’s actions designed to curb its spread in Vermont. The measures have included the closure of all K-12 schools and Vermont colleges through the remainder of the academic year and the temporary suspension of all non-essential business operations. Additionally, while the Governor has not ordered an official lockdown as in some other states, the Governor’s “Stay Home Stay Safe” order remains in effect until at least May 15, 2020. The driving force behind much of this response, and consequent protocols, is the now familiar concept of social distancing- without which the virus will spread even more aggressively.

Public health experts, including Dr. Meyer, who the Court will hear testimony from directly and whose work and opinions are critical in this context, have cautioned

that incarcerated persons are likely to face serious, even grave, harm due to the outbreak of COVID-19. The unique danger that COVID-19 presents in jails and prisons is due in part to the fact that there is no effective way for these facilities to accomplish the important task of creating social distance between incarcerated people. Amici expect that testimony from the dozen or so current Vermont Department of Corrections (“DOC”) inmates the Court will hear from will confirm the impossibility of achieving social distancing while in DOC custody, and the heightened risks to their health and safety that these individuals face amidst the pandemic.

II. The Rate of Infection in the Vermont DOC is Striking, in Comparison Both to the Rate of Infection in the State of Vermont as a Whole, and Even When Compared to the Highest Rate of Infection for Any State in the Country

As of April 19th, 816 COVID-19 cases have been reported in the State of Vermont, with 38 deaths. *See Vermont Dep’t of Health, Current Activity in Vermont*, available at <https://www.healthvermont.gov/response/coronavirus-covid-19/current-activity-vermont> (last updated Apr. 20, 2020).

Within the Vermont DOC, the first report that an inmate had contracted COVID-19 was April 8, 2020, when it was revealed that an inmate at Northwest State Correctional Facility (“Northwest”) had tested positive. Thereafter, all inmates at Northwest were tested and another 27 inmates cases were confirmed. Staff were also tested. As of April 20, 2020, less than two weeks since the first reported Vermont DOC case, 38 DOC inmates have now tested positive for the virus, of a total prison population of 1,398, and 18 staff members have tested positive. *See Vermont*

Department of Corrections, "COVID-19 Information Page, available at bit.ly/3bpukO7.

See also "VT Jail Population as of 4/20/2020," available at bit.ly/2xNJ4Ym.

Thus, the rate of COVID-19 infection in the Vermont DOC is now significantly higher than the rate of infection in the rest of the state. In fact, at 2.7% of the population, the rate of infection in the DOC is 20 times higher than the rate of infection in the State of Vermont as a whole, which is only .1%. *See* New York Times, "Vermont Coronavirus Map and Case Count," available at <https://nyti.ms/34Vfexw>.

In addition, those who are tested in Vermont jails are more likely to test positive. In the state of Vermont, generally, 6% of tests are positive, in comparison to 18% of tests administered within the DOC. *See* Vermont Department of Corrections, "Inmate Testing Information," available at bit.ly/3bpukO7. *See also* John's Hopkins, Coronavirus Resource Center, available at bit.ly/34Qqhb7.

For perspective, the rate of COVID-19 infection in the Vermont DOC is not only significantly higher than the rate of infection in the rest of the state, but also in comparison to the rest of the country. Vermont jails have twice the rate of infection than exists in New York, the state with the highest infection rate in the country. As of April 20, 2020, New York state had a contraction rate of 1.25%. *See* Legal Aid Society, "COVID-19 Infection Tracking in NYC Jails," available at <https://bit.ly/2VJhmE7>. Additionally, incarcerated people in Vermont prisons are ten times more likely to contract the virus than is an average person in the United States generally, where the rate is only .23%. *Id.*

III. The Vermont DOC Response to the COVID-19 Pandemic

While the DOC has apparently taken certain steps to respond to the growing rate of COVID-19 infection in its facilities, it is unlikely that these measures are sufficient or even adequate to stave off the threat that the pandemic presents to DOC inmates or to treat and care for inmates who have become infected with the virus while in custody.

For instance, reports indicate that the DOC has assigned some individuals that typically serve as administrators with filling small hand sanitizer bottles and has segregated the sick from the currently healthy, moving 28 inmates who initially tested positive for the virus to the Northeast Correctional Complex (“Northeast”), a facility in St. Johnsbury . See Emily Corwin, VPR, *How are Vermont Prisons Handling COVID-19?*, available at <https://www.vpr.org/post/how-are-vermont-prisons-handling-covid-19> (Apr. 17, 2020). Moreover, at Northeast, 25 unquarantined inmates were then tasked with preparing food for the isolated sick inmates, while staff at the facility migrates back and forth between the infected and “healthy” inmates.

These measures are inadequate for several reasons. Understandably, while the DOC reports that measures have been taken to protect the healthy inmates who come in contact with staff who are caring for those with the virus, the yet-to-be-infected inmates are understandably not comfortable with the arrangement and the risks it presents to their health and. *See id.*

In addition, while Northeast presently has enough beds available to house inmates who have tested positive for COVID-19 and must therefore be quarantined from the rest of the DOC population, the facility is rapidly reaching capacity and the

number of infected inmates will almost certainly increase, in particular given the fact that members of the greater Vermont community regularly move in and out of DOC facilities. The DOC has indicated that it will find some other site if the numbers continue to increase, but it is telling that they have yet to identify any site where additional infected inmates may be held.

ARGUMENT

The Department of Corrections Is Demonstrably Ill-equipped to Adequately Respond to the Pandemic, and the Court Must Intervene to Protect the Constitutional Rights of Those Incarcerated

The Court is undoubtedly aware of the daunting obligation the DOC has to protect the health and safety of all of those in its charge during the pendency of an unprecedented pandemic. *See also*, 28 V.S.A. § 801(a). the DOC is, however, ill-equipped to adequately respond and, therefore, to fulfill its obligations to those in DOC custody. In fact, as the moving parties make clear, these issues, as laid out herein, are of constitutional dimension and thus mandate court intervention.

A. The DOC Is Not Equipped or Prepared to Meet the Health and Safety Needs of DOC Inmates Amidst the COVID-19 Pandemic

In a time when colleges and universities across the country have rapidly shut down for the remainder of the academic year, largely due to population density and close quarters in dormitories, Vermont DOC inmates remain in similarly close, albeit much more restrictive quarters. And, while the risk of infection with COVID-19 is demonstrably greater for those in DOC custody than for individuals in the greater community, inmates have been left to fend for themselves with scant resources and

limited ability to protect themselves from contracting the virus. Indeed, in a time when hand soap, sanitizers, masks, and cleaning products have become basic necessities required for survival and to reduce the spread of a deadly disease, inmates only receive these requisite items belatedly, and when they are available, as DOC facilities struggle to secure them. See Emily Corwin, VPR, *How are Vermont Prisons Handling COVID-19?*, available at <https://www.vpr.org/post/how-are-vermont-prisons-handling-covid-19> (Apr. 17, 2020).

Moreover, while many have noted that the national response to this pandemic was unnecessarily delayed, the response by the DOC has been even more protracted. As an initial matter, throughout its pandemic response, the DOC has not been transparent about its plans to protect incarcerated individuals. The DOC has also consistently demonstrated its inability to implement policies and procedures, even those akin to the policies and procedures in correctional facilities in other states.

These failures are striking given that a swift and effective response is necessary to combat and prevent the spread of COVID-19, and in particular, to identify, isolate, and treat those who have contracted the virus – especially when many people remain asymptomatic. . Yet, even with aggressive testing, DOC inmates remain at a higher risk of infection so long as staff members continue to come and go from the facility and social distancing and other measures cannot be implemented effectively inside prison walls. Notably, it was a staff member, not an inmate, that initially brought the virus into Northwest.

The DOC's failure to effectively control the spread of the virus also, inevitably, leads to other unresolved issues, which likewise demonstrate the DOC's inability to ensure the health and safety of those in DOC custody and to manage this unprecedented situation. For instance, it remains unclear whether the DOC has the ability to treat and/or care for those who become ill enough to require hospitalization. It is also unclear whether the DOC will continue to have a place to house those who have been infected. In addition to capacity issues discussed *ante*, the St. Johnsbury community, through its leadership, has made clear that it does not want any more sick inmates transferred into its community.

In a letter sent by the town's manager, Chad Whitehead, to Governor Scott, Mr. Whitehead wrote, "[t]o increase Caledonia County's infected population over night by a factor of 4 is reckless and dangerous. . . ." Alan J. Keays, VT Digger, *St. Johnsbury Leaders Upset With Move of Covid-19 Inmates to Prison in Town*, available at <https://vtdigger.org/2020/04/13/st-johnsbury-leaders-upset-with-move-of-covid-19-inmates-to-prison-in-town/> (Apr. 13, 2020) (*quoting* Chad Whitehead).

Thus, we strongly urge the Court at the upcoming hearing to take into consideration the anticipated testimony of Dr. Meyer and of the inmates presently incarcerated by the DOC, who are in the best position to assess what the DOC is, and is not, doing in response to the pandemic. We similarly implore the Court to consider that it is impossible, given the realities of DOC incarceration, for inmates to practice social

distancing or to take other steps that prevailing medical standards have established are necessary to prevent the spread of the virus.³

Accordingly, it is respectfully submitted that the Court join with judges in other jurisdictions across the country, who have reviewed inmate motions and petitions similar to those that are currently before this Court, and who have taken steps to reduce incarceration by releasing inmates on bail in light of this unprecedented pandemic and the conditions of confinement issues it brings to light.⁴

**B. The Court Must Intervene to Protect the
Constitutional Rights of the Inmates Seeking Release**

Although the State's position is that the Court need not intervene, as discussed herein, the applications before the Court for release amidst, and in light of, the COVID-19 pandemic, raise constitutional issues and violations, and therefore require judicial intervention. The arguments raised by the moving parties, which Amici support, can largely be broken into three main categories: (1) the present conditions in Vermont's prisons are relevant to determining bail and requests for sentence reconsideration; (2) there are situations in which a sentence, or pretrial detention, may be illegal in that the sentence or detention violates the Fifth, Eighth, and/or Fourteenth Amendments to the

³ 28 V.S.A. 801(a) provides that, "[t]he Department shall provide health care for inmates in accordance with the prevailing medical standards." The prevailing medical standards require physical distancing to avoid contracting COVID-19, and where the DOC is not making this possible, they are in violation of this statute.

⁴ Amici refer the Court to a list of court actions that was filed in the Massachusetts Supreme Judicial Court. *See Appendix: Court Actions Across the Country to Reduce Incarceration in Light of COVID-19*, filed with *Reply Brief of the Petitioners on Reservation and Report from the Supreme Judicial Court for Suffolk County, Committee for Public Counsel Services and Massachusetts Association of Criminal Defense Lawyers v. Chief Justice of the Trial Court*, No. SJC-12926. A copy of this appendix is attached hereto.

U.S. Constitution; and (3) it is the responsibility of Vermont's courts to determine the rights of those detained in the state's prisons.

As the COVID-19 pandemic continues we cannot ignore the fact that imprisoned individuals are at a higher risk of infection merely by virtue of being in prison, and that those in DOC custody in Vermont are 20 times more likely to contract the virus than if they were elsewhere in the state of Vermont. It therefore follows that the Court should consider the unconstitutional conditions of confinement that lead to these harsh realities, and the threat that the pandemic presents to those in DOC custody, when evaluating whether to impose and/or reduce bail, determining appropriate conditions of release, and assessing a request for sentence reconsideration.

Indeed, when the government incarcerates someone, "the Constitution imposes upon it a corresponding duty to assume some responsibility for [their] safety and general well-being." *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 199-200 (1989); *see also Youngberg v. Romeo*, 457 U.S. 307, 315-16, 324 (1982) (both criminal and civil detainees have constitutionally protected interests in safety and the state has an "unquestioned duty to provide adequate food, shelter, clothing, and medical care" for such persons); *Wilson v. Seiter*, 501 U.S. 294, 300 (1991) (when the conditions at a jail deprive inmates of one or more basic human needs, the Eighth Amendment is violated).

As a result, the government must provide those in its custody with "food, clothing, shelter, medical care, and reasonable safety." *Id.* at 200. This obligation requires corrections officials to protect detainees from infectious diseases like COVID-19. *Helling v. McKinney*, 509 U.S. 25, 33-34 (1993) ("That the Eighth Amendment protects

against future harm to inmates is not a novel proposition. . . . It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them"); *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) ("[C]orrectional officials have an affirmative obligation to protect [forcibly confined] inmates from infectious disease"); see also *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) ("[H]aving stripped [prisoners] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course."). When persons are subjected to unconstitutional conditions of confinement prior to trial or disposition, their claims are governed by the Fifth and Fourteenth Amendment Due Process Clause, not Eighth Amendment cruel and unusual punishment jurisprudence applicable to sentenced inmates.⁵ But in *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244 (1983), the Court noted that the "deliberate indifference" standard under the Eighth Amendment is the minimum threshold, particularly because persons not convicted of a crime may not be punished. *Id.* at 244 (citing *Ingraham*, 430 U.S. at 671–72; *Bell v. Wolfish*, 441 U.S. 520 (1979)).

The Court subsequently "has never determined what degree of culpability must be shown" to establish a violation of the due process right to medical care and reasonable safety. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 n. 8 (1989). In 2015, however, the Supreme Court decided *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), which set a new, objective-only deliberate indifference standard for pretrial detainees

raising excessive force allegations. The Second Circuit, as well as the Seventh and Ninth Circuits, have extended this lower threshold to pretrial medical claims.

The DOC is not a medical institution and its staff are not medical professionals. They have no expertise in weighing the constraints on institutional space raised by a pandemic, in caring for or treating sick inmates, or in preventing the spread of the virus. At a time when actual medical experts, institutions, and professionals are struggling to respond and plan in response to this pandemic, the DOC is even more ill-suited to take on the task.

Such analysis makes evident that the Court must take into account the impact of the COVID-19 pandemic on Vermont's incarcerated population and it must intervene to help those that are incarcerated in the Vermont DOC during this time. The State, and in turn the DOC, cannot be permitted to argue that concerns about inmate health and treatment during a deadly pandemic are merely administrative matters for the DOC (as the agency in charge of their custody and healthcare) to address, rather than issues of constitutional proportion for the Courts to adjudicate. in the face of Nor is it reasonable for the DOC to declare that any aggrieved party can simply pursue an action pursuant to 42 U.S.C. § 1983.⁶

⁶ An action pursuant to § 1983, would be both difficult and dangerous for an inmate to pursue during the pandemic because it would require the inmate to first exhaust his or her administrative remedies under the Prison Litigation Reform Act ("PLRA"), which can take up to thirty days under DOC's emergency grievance process, and relief, if achieved under this complex process, may come too late..

The COVID-19 pandemic presents a significant public health crisis in Vermont and the Court's intervention in these instant matters of constitutional significance can both alleviate that crisis and ensure the fair and humane administration of justice.

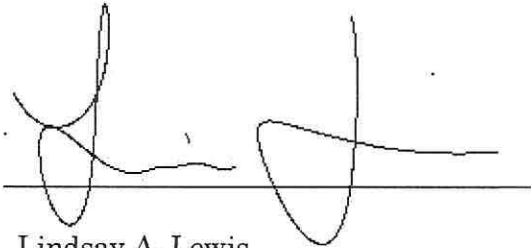
CONCLUSION

Based upon the analysis and authorities set forth in the pending consolidated motions, and for the reasons contained herein, respectfully, this Honorable Court should grant the moving parties the appropriate relief as requested.

DATED at Burlington, Vermont this 21st day of April, 2020.

Respectfully submitted on behalf of,

THE NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS AS
AMICUS CURIAE ,

A handwritten signature in black ink, appearing to read 'Lindsay A. Lewis', written over a horizontal line.

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Appendix: Court Actions Across the Country to Reduce Incarceration in Light of Covid-19¹

State	Judicial Body	Forum	Nature of Relief
Alabama	Circuit Court for the 19 th Judicial Circuit of Alabama	Administrative order	<ul style="list-style-type: none"> Judge Fuller ordered “all inmates currently held on appearance bonds of \$5,000.00 or less be immediately released on recognizance with instructions to personally appear at their next schedule court appearance.”²
Arizona	Coconino County court system and jail, Judge Dan Slayton, along with other county judges	Court order	<ul style="list-style-type: none"> As of March 20, 2020, Judge Dan Slayton and other county judges have released around 50 people who were held in the county jail on non-violent charges.³
California	Supreme Court of California, Chief Justice Tani Cantil-Sakauye	Advisory	<ul style="list-style-type: none"> The Chief Justice issued guidance encouraging the state’s superior courts to, among other things: <ul style="list-style-type: none"> “Lower bail amounts significantly for the duration of the coronavirus emergency, including lowering the bail amount to \$0 for many lower level offenses.” “Consider a defendant’s existing health conditions, and conditions existing at the anticipated place of confinement, in setting conditions of custody for adult or juvenile defendants.” “Identify detainees with less than 60 days in custody to permit early release, with or without supervision or community-based treatment.”⁴
	Sacramento Superior Court, Judge Hom	Order	<ul style="list-style-type: none"> The Court entered a standing order authorizing their sheriff to release those within 30 days of release, regardless of crime.⁵
Kentucky	Kentucky, Chief Justice John Minton Jr.	Letter to state judges and court clerks	<ul style="list-style-type: none"> Kentucky, Chief Justice John Minton Jr. told state’s judges and court clerks to release jail inmates “as quickly as we can” noting, “jails are susceptible to worse-case scenarios due to the close proximity of people and the number of pre-existing conditions,” and that courts have the responsibility “to work with jailers and other county officials to safely release as many defendants as we can as quickly as we can.”⁶



Maine	State of Maine Superior Court, Chief Justice Mullen and District Court Chief Judge Sparaco and Deputy Chief Judge French	Emergency Order	<ul style="list-style-type: none"> The Superior Court and District Court ordered all trial courts to immediately vacate all outstanding warrants for unpaid fines, restitution, fees, and failures to appear.⁷
Michigan	Chief Justice Bridget M. McCormack, Michigan Supreme Court	Joint Statement	<ul style="list-style-type: none"> In a Joint statement, Chief Justice McCormack urged judges to “use the statutory authority they have to reduce and suspend jail sentences for people who do not pose a public safety risk[,]... release far more people on their own recognizance while they await their day in court...[a]nd judges should use probation and treatment programs as jail alternatives.”⁸
Montana	Supreme Court of Montana, Chief Justice McGrath	Letter to Judges	<ul style="list-style-type: none"> Chief Justice of the Montana Supreme Court urged judges to “review your jail rosters and release, without bond, as many prisoners as you are able, especially those being held for non-violent offenses.”⁹
New Jersey	New Jersey Supreme Court, Chief Justice Rabner	Consent Order	<ul style="list-style-type: none"> In New Jersey, after the Supreme Court ordered briefing and argument on why it should not order the immediate release of individuals serving county jail sentences, the Attorney General and County Prosecutors agreed to create an immediate presumption of release for every person serving a county jail sentence in New Jersey.¹⁰
New York	New York State Supreme Court, Bronx County, Justice Doris M. Gonzales	Judicial ruling based on writ of habeas corpus	<ul style="list-style-type: none"> In a habeas petition brought by the Legal Aid Society, a Justice Doris M. Gonzales ordered the release of 106 individuals currently held at Rikers Island on a non-criminal technical parole violation. These individuals were selected in the petition by virtue of their age and/or underlying medical condition.¹¹
	New York Supreme Court Justice Mark Dwyer	Judicial ruling based on writ of habeas corpus	<ul style="list-style-type: none"> In a habeas petition brought by the Legal Aid Society, a Justice Mark Dwyer ordered the release of 16 individuals currently held at Rikers Island on pretrial detention or parole violation. These individuals were selected in the petition by virtue of their age and/or underlying medical condition.¹²

Ohio	Ohio Supreme Court, Chief Justice Maureen O'Connor	News Conference	<ul style="list-style-type: none"> Chief Justice O'Connor urged "judges to use their discretion and release people held in jail and incarcerated individuals who are in a high-risk category for being infected with the virus."¹³
South Carolina	Supreme Court of South Carolina, Chief Justice Beatty	Memorandum	<ul style="list-style-type: none"> The Chief Justice instructed that "any person charged with a non-capital crime shall be ordered released pending trial on his own recognizance without surety, unless an unreasonable danger to the community will result or the accused is an extreme flight risk."¹⁴
Texas	Travis County, Texas, Judges	Individual Court Orders	<ul style="list-style-type: none"> Travis County has begun releasing some defendants in custody with underlying health conditions, to reduce the potential spread of COVID-19 in the county's jails. After Austin saw its first positive cases of COVID-19, judges in the county nearly doubled its release of people from local jails on personal bonds, with one judge alone reversing four bond decisions after "balancing this pandemic and public health safety of inmates against what they're charged with."¹⁵
Utah	Utah Supreme Court and Utah Judicial Council, Chief Justice Durrant	Administrative Order	<ul style="list-style-type: none"> The Chief Justice of the Utah Supreme Court ordered that for defendants in-custody on certain misdemeanor offenses, "the assigned judge must reconsider the defendant's custody status and is encouraged to release the defendant subject to appropriate conditions."¹⁶
Washington	Washington Supreme Court, Chief Justice Stephens	Order	<ul style="list-style-type: none"> Chief Justice Stephens ordered judges not to issue bench warrants for failure to appear, "unless necessary for the immediate preservation of public or individual safety" and "to hear motions for pretrial release on an expediated basis without requiring a motion to shorten time." Additionally, for populations designated as at-risk or vulnerable by the Centers for Disease Control, the COVID-19 crisis is presumed to be a material change in circumstances to permit amendment of a previous bail order or to modify conditions of pre-trial release.¹⁷
Wyoming	Wyoming Supreme Court, Chief Justice Davis	Order	<ul style="list-style-type: none"> The Chief Justice instructed judges to issue summonses instead of bench warrants, unless public safety compels otherwise.¹⁸

Federal Criminal Detention	C.D. Cal, Judge James V. Selna	Minute Order	<ul style="list-style-type: none"> The Court granted temporary release for 90 days, pursuant to 18 U.S.C. § 3142 (i), which authorizes discretionary temporary release when necessary for a person's defense or another compelling reason. Judge Selna held the defendant's age and medical conditions, which place him in the population most susceptible to COVID-19, and in light of the pandemic, to constitute "another compelling reason" and granted his temporary release.¹⁹
	D. Ct., Judge Jeffrey A. Meyer	Order	<ul style="list-style-type: none"> Judge Meyer ordered the release of defendant stating that "the conditions of confinement at Wyatt are not compatible" with current COVID-19 public health guidance concerning social distancing and avoiding congregating in large groups. Judge Meyer is one of four federal judges in Connecticut who has released inmates in connection with the COVID-19 pandemic.²⁰
	D.D.C., Judge Randolph D. Moss	Minute Order	<ul style="list-style-type: none"> Judge Moss released defendant, despite acknowledging offense charged—marijuana distribution and felon in possession—"is serious" because among other factors mitigating public safety concerns "incarcerating the defendant while the current COVID-19 crisis continues to expand poses a greater risk to community safety than posed by Defendant's release to home confinement."²¹
	D.D.C., Judge Randolph D. Moss	Memorandum Opinion	<ul style="list-style-type: none"> Judge Moss released defendant while awaiting trial after weighing the risk to the public of releasing defendant [charged with distribution of child pornography] directly against risk to community safety if defendant remained incarcerated in light of the COVID-19 pandemic.²²

	D. Nev., Judge Jones	Opinion and Order	<ul style="list-style-type: none"> Judge Jones delayed defendant's date to surrender to begin his intermittent confinement by a minimum of 30 days because "[i]n considering the total harm and benefits to prisoner and society . . . temporarily suspending [defendant's] intermittent confinement would appear to satisfy the interests of everyone during this rapidly encroaching pandemic." In coming to this conclusion, the court placed weight on the fact that "incarcerated individuals are at special risk of infection, given their living situations, and may also be less able to participate in proactive measures to keep themselves safe; because infection control is challenging in these settings."²³
	D. S.C., Judge David C. Norton	Order	<ul style="list-style-type: none"> Judge Norton granted compassionate release for 73-year-old with severe health conditions under the First Step Act, "[g]iven defendant's tenuous health condition and age, remaining incarcerated during the current global pandemic puts him at even higher risk for severe illness and possible death, and Congress has expressed its desire for courts to [release federal inmates who are vulnerable to COVID-19]."²⁴
	N.D. Cal., Judge Vince Chhabria	Sua Sponte Order	<ul style="list-style-type: none"> Judge Chhabria issued a sua sponte decision extending defendant's surrender date from June 12, 2020 to September 1, 2020 stating: "By now it almost goes without saying that we should not be adding to the prison population during the COVID-19 pandemic if it can be avoided . . . To avoid adding to the chaos and creating unnecessary health risks, offenders who are on release and scheduled to surrender to the Bureau of Prisons in the coming months should, absent truly extraordinary circumstances, have their surrender dates extended until this public health crisis has passed."²⁵
	N.D. Cal., Judge Hixson	Order	<ul style="list-style-type: none"> Judge Hixson released a 74-year old in light of COVID-19 holding "[t]he risk that this vulnerable person will contract COVID-19 while in jail is a special circumstance that warrants bail. Release under the current circumstances also serves the United States' treaty obligation to Peru, which - if there is probable cause to believe Toledo committed the alleged crimes - is to deliver him to Peru alive."²⁶

	S.D.N.Y., Judge Paul A. Engelmayer	Amended Order	<ul style="list-style-type: none"> Judge Engelmayer granted defendant temporary release from custody, pursuant to 18 U.S.C. § 3142(i), “based on the unique confluence of serious health issues and other risk factors facing this defendant, including but not limited to the defendant’s serious progressive lung disease and other significant health issues, which place him at a substantially heightened risk of dangerous complications should be contract COVID-19 as compared to most other individuals.”²⁷
	S.D.N.Y., Judge Alison J. Nathan	Opinion & Order	<ul style="list-style-type: none"> Judge Nathan ordered the Defendant released subject to the additional conditions of 24-hour home incarceration and electronic location monitoring as directed by the Probation Department based in part on “the unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic” which may place “at a heightened risk of contracting COVID-19 should an outbreak develop [in a prison].”²⁸
Federal Immigration Detention	9th Cir., Judges Wardlaw, M. Smith, and Judge Siler, 6 th Cir., sitting by designation.	Sua Sponte Order	<ul style="list-style-type: none"> The panel held “[i]n light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers, the court <i>sua sponte</i> orders that Petitioner be immediately released from detention and that removal of Petitioner be stayed pending final disposition by this court.”²⁹
	C.D. Cal, Judge Terry J. Halter, Jr.	TRO and order to show cause based on writ of habeas corpus	<ul style="list-style-type: none"> Judge Halter ordered the release of two ICE detainees. The court found that in detention “[p]etitioners have not been protected [against risks associated with COVID-19]. They are not kept at least 6 feet apart from others at all times. They have been put into a situation where they are forced to touch surfaces touched by other detainees, such as with common sinks, toilets and showers. Moreover, the Government cannot deny the fact that the risk of infection in immigration detention facilities – and jails – is particularly high if an asymptomatic guard, or other employee, enters a facility. While social visits have been discontinued at Adelanto, the rotation of guards and other staff continues.”³⁰
	D. Mass, Judge Mark L. Wolf	Oral Order	<ul style="list-style-type: none"> Judge Wolf ordered the release, with conditions, from ICE custody a member of the class in <i>Calderon v. Nielsen</i> based, in part, on the “extraordinary circumstances” posed by COVID-19.³¹

	S.D.N.Y., Judge George B. Daniels	Memorandum Decision and Order	<ul style="list-style-type: none"> Judge Daniels ordered the release, under <i>Mapp v. Reno</i>, 241 F.3d 221 (2d Cir. 2001), of an individual as there was likelihood of success on the merits and COVID-19 risks and individual's own medical issues constituted "extraordinary circumstances warranting release."³²
	S.D.N.Y., Judge Alison J. Nathan	Opinion and Order	<ul style="list-style-type: none"> Judge Nathan ordered the immediate release of four detainees finding "no evidence that the government took any specific action to prevent the spread of COVID-19 to high-risk individuals . . . held in civil detention."³³
	S.D.N.Y., Judge Analisa Torres	Memorandum Decision and Order.	<ul style="list-style-type: none"> Judge Torres granted immediate release on recognizance for ten individuals in immigration detention who have a variety of chronic health conditions that put them at high risk for COVID-19. These conditions include obesity, asthma, diabetes, pulmonary disease, history of congestive heart failure, respiratory problems, gastrointestinal problems, and colorectal bleeding. The court held detainees face serious risks to their health in confinement and "if they remain in immigration detention constitutes irreparable harm warranting a TRO."³⁴

¹ This chart provides only a sample of the judicial action taken throughout the country as judges continue to respond to the COVID-19 pandemic.

² Administrative Order, No. 2020-00010, Ala. Ct. App. (Mar. 18, 2020), <https://drive.google.com/file/d/1I4QLwsvtSVkdOuo5p6gb1JcuFWcAV4oA/view?usp=sharing>. Note: the original order has been revised to provide discretion to the Sheriffs. See Mike Carson, *Alabama Judge Orders Jail Inmates Released, then Leaves it Up to Sheriffs*, AL.Com (Mar. 19, 2020), <https://www.al.com/news/2020/03/alabama-judge-orders-jail-inmates-released-then-leaves-it-up-to-sheriffs.html>.

³ Scott Buffon, *Coconino County Jail Releases Nonviolent Inmates in Light of Coronavirus Concerns*, Arizona Daily Sun (updated Mar. 25, 2020), https://azdailysun.com/news/local/coconino-county-jail-releases-nonviolent-inmates-in-light-of-coronavirus/article_a6046904-18ff-532a-9dba-54a58862c50b.html.

⁴ Advisory from California Chief Justice Tani Cantil-Sakauye to Presiding Judges and Court Executive Officers of the California Courts (Mar. 20, 2020), <https://newsroom.courts.ca.gov/news/california-chief-justice-issues-second-advisory->

on-emergency-relief-measures.

⁵ *Standing Order of the Sacramento Superior Court*, No. SSC-20-PA5 (Mar. 17, 2020),

<https://www.saccourt.ca.gov/general/standing-orders/docs/ssc-20-5.pdf>.

⁶ Kyle C. Barry, *Some Supreme Courts Are Helping Shrink Jails to Stop Outbreaks. Others Are Lagging Behind*, The Appeal (Mar. 25, 2020), [https://theappeal.org/politicalreport/some-supreme-courts-are-helping-shrink-jails-](https://theappeal.org/politicalreport/some-supreme-courts-are-helping-shrink-jails-coronavirus)

[coronavirus](https://theappeal.org/politicalreport/some-supreme-courts-are-helping-shrink-jails-coronavirus); John Cheves, *Chief Justice Pleads for Kentucky Inmate Release Ahead of COVID-19 but Progress Slow*, Lexington Herald Leader (Mar. 23, 2020),

<https://www.kentucky.com/news/coronavirus/article241428266.html>.

⁷ Emergency Order Vacating Warrants for Unpaid Fines, Unpaid Restitution, Unpaid Court-Appointed Counsel Fees, and Other Criminal Fees (Mar. 17, 2020), <https://www.courts.maine.gov/covid19/emergency-order-vacating-warrants-fines-fees.pdf>.

⁸ Joint Statement of Chief Justice Bridget M. McCormack, Mich. Sup. Ct. and Sheriff Matt Saxton, Exec. Dir., Mich. Sheriff Ass'n (Mar. 26, 2020), [https://courts.michigan.gov/News-](https://courts.michigan.gov/News-Events/press_releases/Documents/CJ%20and%20MSA%20Joint%20Statement%20draft%202%20(003).pdf)

[Events/press_releases/Documents/CJ%20and%20MSA%20Joint%20Statement%20draft%202%20\(003\).pdf](https://courts.michigan.gov/News-Events/press_releases/Documents/CJ%20and%20MSA%20Joint%20Statement%20draft%202%20(003).pdf).

⁹ Letter from Chief Justice Mike McGrath, Mont. Sup. Ct. to Mont. Ct. of Ltd. Jurisdiction Judges (Mar. 20, 2020),

<https://courts.mt.gov/Portals/189/virus/Ltr%20to%20COLJ%20Judges%20re%20COVID-19%20032020.pdf?ver=2020-03-20-115517-333>.

¹⁰ Consent Order, *In the Matter of the Request to Commute or Suspend County Jail Sentences*, No. 084230 (N.J.

March 22, 2020), [https://www.aclu-nj.org/files/5415/8496/4744/2020.03.22_-_Consent_Order_Filed_Stamped_Copy-](https://www.aclu-nj.org/files/5415/8496/4744/2020.03.22_-_Consent_Order_Filed_Stamped_Copy-1.pdf)

[1.pdf](https://www.aclu-nj.org/files/5415/8496/4744/2020.03.22_-_Consent_Order_Filed_Stamped_Copy-1.pdf).

¹¹ *People of the State of New York, ex rel., v. Cynthia Brann*, No. 260154/2020 (Sup. Ct. NY Mar. 25, 2020),

[https://linkprotect.cudasvc.com/url?a=https%3a%2f%2flegalaidnyc.org%2fwp-](https://linkprotect.cudasvc.com/url?a=https%3a%2f%2flegalaidnyc.org%2fwp-content%2fuploads%2f2020%2f03%2fLAS-Mass-Parole-Holds-Writ.pdf&c=E.L.pDbcoVtCj0c6j6E8cI3m276vaRsx-nztikQuvDWwS91mRHj6RhL8o5pEJmJl-lk86sC7-f1rq9dTTh2Pe3ZmAUcoZCiC9er2g4Z4mL_ToQ.&typo=1)

[content%2fuploads%2f2020%2f03%2fLAS-Mass-Parole-Holds-Writ.pdf&c=E.L.pDbcoVtCj0c6j6E8cI3m276vaRsx-](https://linkprotect.cudasvc.com/url?a=https%3a%2f%2flegalaidnyc.org%2fwp-content%2fuploads%2f2020%2f03%2fLAS-Mass-Parole-Holds-Writ.pdf&c=E.L.pDbcoVtCj0c6j6E8cI3m276vaRsx-nztikQuvDWwS91mRHj6RhL8o5pEJmJl-lk86sC7-f1rq9dTTh2Pe3ZmAUcoZCiC9er2g4Z4mL_ToQ.&typo=1)

[nztikQuvDWwS91mRHj6RhL8o5pEJmJl-lk86sC7-f1rq9dTTh2Pe3ZmAUcoZCiC9er2g4Z4mL_ToQ.&typo=1](https://linkprotect.cudasvc.com/url?a=https%3a%2f%2flegalaidnyc.org%2fwp-content%2fuploads%2f2020%2f03%2fLAS-Mass-Parole-Holds-Writ.pdf&c=E.L.pDbcoVtCj0c6j6E8cI3m276vaRsx-nztikQuvDWwS91mRHj6RhL8o5pEJmJl-lk86sC7-f1rq9dTTh2Pe3ZmAUcoZCiC9er2g4Z4mL_ToQ.&typo=1); see

also Frank G. Runyeon, *NY Judges Release 122 Inmates as Virus Cases Spike in Jails*, Law360 (March 27, 2020),

<https://www.law360.com/newyork/articles/1257871/nv-judges-release-122-inmates-as-virus-cases-spike-in-jails>.

¹² *Jeffrey v. Bran*, (Sup. Ct. NY Mar. 26, 2020). See Press Release, Redmon Haskins, *Legal Aid Wins Release of 16*

Incarcerated New Yorkers at a High Risk of COVID-19 from City Jails (Mar. 26, 2020),

<https://legalaidnyc.org/wp-content/uploads/2020/03/03-26-20-Legal-Aid-Wins-Release-of-16-Incarcerated-New-Yorkers-at-a-high-risk-of-COVID-19-from-City-Jails.pdf>;

see also Runyeon, *NY Judges Release 122 Inmates*, *supra* note 11.

¹³ Press Conference, Ohio Chief Justice Maureen O'Connor and Gov. Mike DeWine (Mar. 19, 2020); *see also* WLWT5, *Release Ohio Jail Inmates Vulnerable to Coronavirus, Chief Justice Urges* (Mar. 19, 2020), <https://www.wlwt.com/article/release-ohio-jail-inmates-vulnerable-to-coronavirus-chief-justice-urges/31788560#>.

¹⁴ Memorandum from Chief Justice Beatty, Sup. Ct of S.C to Magistrates, Mun. Judges, and Summary Ct. Staff (March 16, 2020), <https://www.sccourts.org/whatsnew/displayWhatsNew.cfm?indexId=2461>.

¹⁵ Ryan Autullo, *Travis County Judges Releasing Inmates to Limit Coronavirus Spread*, Statesman (Mar. 16, 2020), https://www.statesman.com/news/20200316/travis-county-judges-releasing-inmates-to-limit-coronavirus-spread?fbclid=IwAR3VKawwn3bwSI_S09jXBxXNRuaWd1DRLsCBFc-ZkPN1INWW8xnzLPvZYNO4.

¹⁶ Order, *Administrative Order for Court Operations During Pandemic* (Utah Mar. 21, 2020), <https://www.utcourts.gov/alerts/docs/20200320%20-%20Pandemic%20Administrative%20Order.pdf>.

¹⁷ Am. Order, *In the Matter of Statewide Response by Washington State Courts to the Covid-19 Public Health Emergency*, No. 25700-B-607 (Wash. Mar. 20, 2020), <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/Supreme%20Court%20Emergency%20Order%20re%20CV19%20031820.pdf>.

¹⁸ Order Adopting Temporary Plan to Address Health Risks Posed by the COVID-19 Pandemic, *In the Matter of the Wyoming Supreme Court's Temporary Plan Regarding COVID-19 Pandemic* (Wyo. Mar. 18, 2020), <http://www.courts.state.wv.us/wp-content/uploads/2020/03/COVID-19-Order.pdf>.

¹⁹ Minute Order, *United States v. Michaels*, 8:16-cr-76-JVS, (C.D. Cal. Mar. 26, 2020), https://drive.google.com/file/d/1BeWih63M7FKreKEvLJvIQevYSivGA_PU/view.

²⁰ Edmund H. Mahony, *Courts Ponder the Release of Low Risk Inmates in an Effort to Block the Spread of COVID-19 to the Prison System*, Hartford Currant (Mar. 24, 2020), <https://www.courant.com/coronavirus/hc-news-covid-inmate-releases-20200323-20200324-orevf4kbfbe3adv6u6ajsi57u-story.html>.

²¹ Minute Order, *United States v. Jaffee*, No. 19-cr-88 (RDM) (D.D.C. Mar. 26, 2020), <https://drive.google.com/file/d/1AYITU6QKCOEIpx5Vh3Af6BDqO8goZ5WE/view>.

²² *United States v. Harris*, No. 19-cr-356 (RDM) (D.D.C. Mar. 26, 2020), <https://drive.google.com/file/d/1aO3BNOKB8ukI20A76Mu7Fn0GyCng0Ras/view>.

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- ²⁴ *United States v. Copeland*, No. 2:05-cr-135-DCN, at 7 (D.S.C. Mar. 24, 2020), <https://drive.google.com/file/d/1tvA8Kjvld23QTL0Wo7xbAdqLEOCCVC4q/view>.
- ²⁵ *United States v. Garlock*, No. 18-CR-00418-VC-1, 2020 WL 1439980, at *1 (N.D. Cal. Mar. 25, 2020), https://drive.google.com/file/d/1H47EQMXtQZkXFv_GXStfAV6Xkse3-kpl/view.
- ²⁶ *In The Matter Of The Extradition Of Alejandro Toledo Manrique*, No. 19-mj-71055-MAG, 2020 WL 1307109, at *1 (N.D. Cal. Mar. 19, 2020), <https://drive.google.com/file/d/1A1U1ft4Lcm60QbPhigo9HgGAHkbPKPzD/view>.
- ²⁷ AM. Order, *United States v. Perez*, 19-cr-297 (PAE), at 1 (S.D.N.Y. Mar. 19, 2020), <https://drive.google.com/file/d/17xE8qdGee7TI2d2dWjNDfvmxLc8GxTtA/view>.
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