



# FAIR AND JUST PROSECUTION

Promoting justice through leadership and innovation

## ISSUES AT A GLANCE

## COVID-19 and the Criminal Justice System: *Reducing and Avoiding Incarceration During a Pandemic*

*Fair and Just Prosecution (FJP) brings together recently elected district attorneys<sup>1</sup> as part of a network of like-minded leaders committed to change and innovation. FJP hopes to enable a new generation of prosecutive leaders to learn from best practices, respected experts, and innovative approaches aimed at promoting a justice system grounded in fairness, equity, compassion, and fiscal responsibility. In furtherance of those efforts, FJP's "Issues at a Glance" briefs provide district attorneys with information and insights about a variety of critical and timely topics. These papers give an overview of the issue, key background information, ideas on where and how this issue arises, and specific recommendations to consider. They are intended to be succinct and to provide district attorneys with enough information to evaluate whether they want to pursue further action within their office. For each topic, Fair and Just Prosecution has additional supporting materials, including model policies and guidelines, key academic papers, and other research. If your office wants to learn more about this topic, we encourage you to contact us.*

### SUMMARY

**This FJP "Issues at a Glance" brief is the first in a series examining unfolding criminal justice system responses to mitigate the public health crisis created by the novel coronavirus (COVID-19) – this brief focuses on decarceral strategies for prosecutors.** The COVID-19 pandemic has become a catalyst for increased awareness about our justice system's misguided over-reliance in recent decades on punitive "tough on crime" responses and incarceration. Because outbreaks in criminal justice settings pose a clear threat to those incarcerated and to the larger community, political will to reduce the incarcerated population – including through enacting measures long sought by reform-minded prosecutors – has intensified.

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<sup>1</sup> The terms "district attorney," "DA," or "elected prosecutor" is used generally to refer to any chief local prosecutor, including State's Attorneys, Prosecuting Attorneys, and Attorneys General with local jurisdiction.

***"When this pandemic ends, I need to be able to look my daughters in the eyes and say that I did everything I could to protect the lives of New Jersey's residents, including those currently incarcerated."***

— NEW JERSEY ATTORNEY GENERAL GURBIR GREWAL

This brief describes the circumstances that have made prisons and jails<sup>2</sup> especially vulnerable to the spread of infectious disease, outlines the important role elected prosecutors can play in mitigating this crisis, and provides guiding principles and considerations to inform their responses. It then spotlights actions taken by prosecutors and other officials to reduce jail and prison populations as a roadmap for how prosecutors and other local stakeholders can and should work together to mitigate the spread of COVID-19 in these custodial settings. The challenges presented by this pandemic highlight the pressing need for decarceration not only in the immediate term, but also to ensure that our justice system is better equipped to handle such crises in the future.

## BACKGROUND

### I. The Public Health Impact of Mass Incarceration

The decades of increasingly wide-ranging, punitive and dehumanizing carceral policies – which have made the U.S. an international outlier in its rate of incarceration – have also created the circumstances which render an infectious disease outbreak behind bars catastrophic. With nearly 2.3 million people currently behind bars, the United States incarcerates more than five times as many people as it did in the 1970s, and facilities are routinely strained beyond their capacity.<sup>3</sup> As of 2017, 35 states were operating at above 85 percent of their prison capacity, with 10 above 100 percent,<sup>4</sup> while violence and other crises stemming from the overcrowding of local jails have made headlines in urban and rural jurisdictions alike.<sup>5</sup> Despite the fact that over four decades ago the Supreme Court established that people who are incarcerated are constitutionally entitled to adequate healthcare,<sup>6</sup> over-incarceration, deliberate indifference, and bias have impeded the realization of this obligation. Incarcerating beyond capacity has undermined correctional departments' ability to provide even basic medical care: in 2011, the Supreme Court concluded in *Brown v. Plata* that overcrowding in California's prison system was the primary cause of the "severe and unlawful mistreatment of prisoners through grossly inadequate provision of medical and mental health care."<sup>7</sup>

Compounding the problem is the reality that prisons and jails serve a population with particularly stark healthcare needs: incarcerated people experience infectious disease, mental illness, substance use disorders, and violence at substantially higher rates than the general

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<sup>2</sup> While this brief focuses on the criminal justice system, the same conditions of confinement that make the spread of COVID-19 potentially catastrophic in prisons and jails also apply to immigration detention facilities. For more on what prosecutors and other officials can do to respond to the threat of COVID-19 in immigration detention facilities, see FJP's joint statement: Fair and Just Prosecution (2020), *Joint Statement From Elected Prosecutors on COVID-19 and Addressing the Rights and Needs of Those in Custody*, <https://fairandjustprosecution.org/wp-content/uploads/2020/03/Coronavirus-Sign-On-Letter.pdf>.

<sup>3</sup> Prison Policy Initiative (2020), *Mass Incarceration: The Whole Pie 2020*, <https://www.prisonpolicy.org/reports/pie2020.html>; The Sentencing Project, *Criminal Justice Facts*, <https://www.sentencingproject.org/criminal-justice-facts/>.

<sup>4</sup> Bureau of Justice Statistics (2019), *Prisoners in 2017*, <https://www.bjs.gov/content/pub/pdf/p17.pdf>.

<sup>5</sup> Oppel, R. (2019), 'A Cesspool of a Dungeon': *The Surging Population in Rural Jails*, The New York Times, <https://www.nytimes.com/2019/12/13/us/rural-jails.html>; Winerip, M. and Schwartz, M. (2014), *Rikers: Where Mental Illness Meets Brutality in Jail*, The New York Times, <https://www.nytimes.com/2014/07/14/nyregion/rikers-study-finds-prisoners-injured-by-employees.html>.

<sup>6</sup> *Estelle v. Gamble*, 429 US 97 (1976).

<sup>7</sup> *Brown, et al. v. Plata, et al.*, 563 U.S. 493 (2011).

population.<sup>8</sup> The prevalence within this population of diseases like asthma make COVID-19 especially dangerous.<sup>9</sup> Meanwhile, providing adequate care in correctional settings has become more challenging in recent years, as local jails grapple with the opioid epidemic<sup>10</sup> and prisons confront costs associated with a rapidly growing elderly population. Between 2000 and 2016, the proportion of people age 55 and older in state correctional facilities nearly tripled, to 12 percent of the incarcerated population.<sup>11</sup> And studies have shown that people in prison manifest physical symptoms beyond their chronological age – those over the age of 50 experience health issues that would be expected of people 10-15 years older – meaning that they are at high risk of developing severe complications from COVID-19.<sup>12</sup>

All of these factors – overcrowding, inadequate healthcare, medically vulnerable and elderly populations – already make mass incarceration a public health crisis for the millions of people behind bars. But the onset of COVID-19 has exacerbated the problematic health conditions in jails and prisons, making it difficult, if not impossible, to follow Centers for Disease Control (CDC) guidance on proper virus prevention practices. Prisons and jails are inherently unhygienic: hand sanitizer is often considered contraband, and even access to soap and sinks may be limited.<sup>13</sup> Even if hygiene in prisons and jails improves, people who are incarcerated are in almost constant close proximity due to the way facilities are designed, with large numbers of people sharing open dormitories or double-bunked cells and common eating areas, and with very limited infirmary beds or rooms for medical isolation.<sup>14</sup> In short, overcrowding means that the disease control measures crucial to containing COVID-19, such as social distancing and quarantining of sick individuals, are extremely difficult to implement in prisons and jails.<sup>15</sup>

In the first month of widespread national social distancing measures due to the pandemic, the heightened threat that COVID-19 presents in a custodial setting quickly became evident. By late April, about one in four confirmed cases in Ohio was connected to the state's prison system, and the state's Marion Correctional Facility was the nation's largest known cluster, with at least 2,356

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<sup>8</sup> The Vera Institute of Justice (2014), *On Life Support: Public Health in the Age of Mass Incarceration*, <https://www.vera.org/publications/on-life-support-public-health-in-the-age-of-mass-incarceration>.

<sup>9</sup> The Justice Collaborative (2020), *Explainer: Prisons and Jails Are Particularly Vulnerable to COVID-19 Outbreaks*, <https://thejusticecollaborative.com/wp-content/uploads/2020/03/TJCVulnerabilityofPrisonsandJailstoCOVID19Explainer.pdf>.

<sup>10</sup> Coll, S. (2019), *The Jail Health Care Crisis*, *The New Yorker*, <https://www.newyorker.com/magazine/2019/03/04/the-jail-health-care-crisis>.

<sup>11</sup> Li, W. and Lewis, N. (2020), *This Chart Shows Why The Prison Population Is So Vulnerable to COVID-19*, *The Marshall Project*, <https://www.themarshallproject.org/2020/03/19/this-chart-shows-why-the-prison-population-is-so-vulnerable-to-covid-19>.

<sup>12</sup> Chammah, M. (2015), *Do You Age Faster In Prison?*, *The Marshall Project*, <https://www.themarshallproject.org/2015/08/24/do-you-age-faster-in-prison>; Centers for Disease Control and Prevention (2020), *Coronavirus Disease 2019: Older Adults*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>.

<sup>13</sup> Blakinger, K. and Schwartzapfel, B. (2020), *When Purell is Contraband, How Do You Contain Coronavirus?*, *The Marshall Project*, <https://www.themarshallproject.org/2020/03/06/when-purell-is-contraband-how-do-you-contain-coronavirus>.

<sup>14</sup> Morris, M. (2020), *Are Our Prisons And Jails Ready for COVID-19?*, *American Civil Liberties Union*, <https://www.aclu.org/news/prisoners-rights/are-our-prisons-and-jails-ready-for-covid-19/>.

<sup>15</sup> Gross, D. (2020), *"It Spreads Like Wildfire": The Coronavirus Comes To New York's Prisons*, *The New Yorker*, <https://www.newyorker.com/news/news-desk/it-spreads-like-wildfire-covid-19-comes-to-new-yorks-prisons>.

cases associated with the facility, and nearly 80 percent of incarcerated people testing positive.<sup>16</sup>

In New York City's Rikers Island jail complex, the number of cases increased from one to 200 in just 12 days, and the infection rate in New York City jails generally was nearly eightfold that of New York City.<sup>17</sup> Moreover, the rate of infection among correctional staff was even higher, with 441 staff having tested positive at the same time as 287 incarcerated people, underscoring the public health connection between people who live and work in facilities and the communities to which staff return at the end of each shift.<sup>18</sup> Due to the highly communicable nature of the virus, the threat COVID-19 poses behind bars also directly affects the health and safety of people in the broader community. All of these concerns have led to a recent ACLU projection that, absent immediate and decisive action, an additional 100,000 individuals could die as a result of the spread of this disease in jails.<sup>19</sup>

## II. Key Principles for Criminal Justice System Responses to COVID-19

In light of the rapid spread of COVID-19 behind bars and the limited ability of facilities to contain such outbreaks, mitigating this public health crisis requires bold, collaborative decarceral approaches by prosecutors, state leaders, and other criminal justice system stakeholders. As the need intensifies for rapid and comprehensive changes to criminal justice practice to maintain basic safety in correctional settings, certain principles should undergird these responses. As set forth in greater detail in the next section, elected prosecutors can play a key leadership role in advancing the principles listed below – and have an obligation to do so.

1. **Decisions should be guided by public health expertise.** Responses to this crisis should be grounded in empirically validated public health approaches. Preserving the health and well-being of all people in our society – including those who are incarcerated – is integral to a prosecutor's duty. Furthermore, when the criminal justice system ignores public health guidance, it erodes the community's faith and trust in the institution and has a detrimental effect on public safety.

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<sup>16</sup> The New York Times (2020), *Coronavirus in the U.S.: Latest Map and Case Count*, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html?action=click&module=Top%20Stories&pgtype=Homepage&action=click&module=Spotlight&pgtype=Homepage#states>; Syed, M. and Imam, J. (2020) *Inmates fear death as Ohio prison is overwhelmed by coronavirus*, NBC, <https://www.nbcnews.com/news/us-news/inmates-fear-death-ohio-prison-overwhelmed-coronavirus-n1194786>.

<sup>17</sup> Bryant, M. (2020), *Coronavirus spread at Rikers is a 'public health disaster', says jail's top doctor*, The Guardian, <https://www.theguardian.com/us-news/2020/apr/01/rikers-island-jail-coronavirus-public-health-disaster>.

<sup>18</sup> Williams, T. and Ivory, D. (2020), *Chicago's Jail Is Top U.S. Hot Spot As Virus Spreads Behind Bars*, The New York Times, <https://www.nytimes.com/2020/04/08/us/coronavirus-cook-county-jail-chicago.html>.

<sup>19</sup> American Civil Liberties Union (2020), *COVID-19 Model Finds Nearly 100,000 More Deaths Than Current Estimates Due To Failures To Reduce Jails*, <https://www.aclu.org/report/flattening-curve-why-reducing-jail-populations-key-beating-covid-19?redirect=covidinjails>.

***"[Prisoners] don't deserve, in addition to the sentence that they got, to be in a haven for COVID-19 and ... a death warrant, potentially."***

**— SUFFOLK COUNTY (BOSTON, MA) DISTRICT ATTORNEY RACHAEL ROLLINS**

2. **Constitutional rights must be preserved.** The implementation of public health measures like social distancing must not come at the cost of the protections the Constitution guarantees in the criminal justice process. For example, as courts move to significantly limit in-person proceedings, the right to a speedy trial should not suffer, or as facilities restrict visitation, the right to counsel must be maintained. Justice system responses to COVID-19 should balance public health needs with the preservation of constitutional rights.
3. **Human dignity should be recognized and prioritized.** People who are incarcerated are not able to make choices that would protect their own health and the health of those around them. Though much advocacy has importantly focused on getting people out of prisons and jails, advocates, prosecutors, and other policymakers must also work to ensure the safety and dignity of those who remain behind bars. Responses to COVID-19 should bear in mind that even as decarceration is achieved, this crisis will likely have a significant and prolonged human toll on people who are incarcerated.
4. **Transparency and accountability are especially critical.** Prosecutors have an obligation to facilitate information-sharing and transparency in the criminal justice system. A lack of information can have profound physical and mental health consequences for people who come in contact with the system, especially those who are incarcerated. Now more than ever, it is difficult for people who have incarcerated loved ones, members of the public, or journalists to know what is happening within facilities. People who are incarcerated, meanwhile, may not have access to the news, internet, or – during lockdowns – telephones. As such, frequent and robust information sharing – both within facilities and in external reporting – is critical.
5. **Criminal justice approaches from other countries provide helpful models.** With an incarceration rate 3 to 10 times that of other Western democracies,<sup>20</sup> the U.S. has been an extreme international outlier in its use of incarceration since well before the COVID-19 crisis. Prosecutors and policymakers should look to how other countries approach criminal justice – from charging and prosecution to sentencing and incarceration – for guidance on how to make incarceration a last resort, while maintaining public safety.<sup>21</sup>

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<sup>20</sup> Prison Policy Initiative (2018), *States of Incarceration: The Global Context 2018*, <https://www.prisonpolicy.org/global/2018.html>.

<sup>21</sup> See, e.g., Fair and Just Prosecution (2020), *Lessons Learned from Germany: Avoiding Unnecessary Incarceration and Limiting Collateral Consequences*, [https://fairandjustprosecution.org/wp-content/uploads/2020/04/FJP\\_Brief\\_GermanIncarceration.pdf](https://fairandjustprosecution.org/wp-content/uploads/2020/04/FJP_Brief_GermanIncarceration.pdf). Other countries can also offer models for immediate responses to the pandemic: the World Health Organization has recommended the depopulation of prisons and jails, and many countries – including France, Indonesia, and Afghanistan – have reduced their incarcerated population by more than 10 percent. A future brief in this series will describe international approaches to decarceration in response to the COVID-19 pandemic. See Ouest France (2020), *Coronavirus. Dans les prisons françaises, près de 10 000 détenus de moins en un mois*, [https://larochesuryon.maville.com/actu/actudet\\_-coronavirus.-dans-les-prisons-francaises-pres-de-10-000-detenus-de-moins-en-un-mois\\_54135-4071762\\_actu.Htm](https://larochesuryon.maville.com/actu/actudet_-coronavirus.-dans-les-prisons-francaises-pres-de-10-000-detenus-de-moins-en-un-mois_54135-4071762_actu.Htm); Widadio, N.A. and Permana, E. (2020), *Indonesia released 22,000 prisoners over COVID-19 fears*, Anadolu Agency, <https://www.aa.com.tr/en/asia-pacific/indonesia-releases-22-000-prisoners-over-covid-19-fears/1791209>; AFP (2020), *Afghanistan to release up to 10,000 prisoners to slow coronavirus spread*, <https://news.yahoo.com/afghanistan-release-10-000-prisoners-slow-coronavirus-spread-211850224.html>.

## THE PROSECUTOR'S ROLE AND RESPONSIBILITY IN KEEPING PEOPLE SAFE DURING A PANDEMIC

Elected prosecutors play an important and integral role in setting criminal justice priorities. Consistent with their mandate to protect the safety and wellbeing of all members of the community, they should lead efforts to minimize the potentially catastrophic impact of COVID-19 on individuals in contact with the justice system, corrections officers, law enforcement, and the broader community. Given the well-documented and longstanding public health, safety, economic, and other negative effects associated with mass incarceration, as well as the recent proliferation of innovative alternatives to tough-on-crime approaches, reforms should not be limited to temporary stopgaps to address the current pandemic. Rather, fully addressing the current crisis necessitates long-term strategies that address the justice system's overreliance on incarceration, which has exacerbated the spread of COVID-19 behind bars.

Elected DAs can lead in promoting and adopting reforms in their offices' practices in response to COVID-19, and in advocating for – and collaborating with other stakeholders to achieve – broader systemic measures. The recommendations below address the primary decarceral reforms that DAs should seek to implement in light of the COVID-19 pandemic, outlining mechanisms for doing so and pointing to key examples from around the nation where prosecutors took quick action in the initial months of the COVID-19 pandemic. These recommendations broadly relate to minimizing the influx of individuals into custody and significantly reducing the current incarcerated population in both prisons and jails.<sup>22</sup>

### I. Limit the Front Door: Slow the Influx of Individuals Into Custody and Minimize Individuals' Unnecessary Contact with the Criminal Justice System

Against the backdrop of the COVID-19 crisis, each stage of interaction with the criminal justice system – from arrest to booking to prosecution – heightens risk of infection and serious illness. Extensive “jail churn,” or the cycling of individuals through jails and prisons on a daily basis caused by short-term detainment and release, poses a particular risk. The level of movement is extreme: one estimate found that over 200,000 individuals are booked into jail each week in the U.S., and about the same number leave weekly.<sup>23</sup>

The movement of individuals from communities where infections may be rampant to courts, local jails, and ultimately prisons heightens risk of infection and rapid spread within facilities and other criminal justice settings, impacting the broader community's ability to “flatten the curve”

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<sup>22</sup> A future brief in this series will describe the prosecutor's role in advocating for humanitarian conditions of confinement for those who remain in custody, as well as reentry strategies.

<sup>23</sup> The Marshall Project (2020), *Why Jails Are So Important in the Fight Against Coronavirus*, <https://www.themarshallproject.org/2020/03/31/why-jails-are-so-important-in-the-fight-against-coronavirus>.

***“As the district attorney, my primary concern is public safety. This particular moment of the COVID-19 pandemic has made clearer than ever the ways in which mass incarceration actually undermines public safety.”***

— SAN FRANCISCO (CA) DISTRICT ATTORNEY CHESA BOUDIN

and minimize the burden of COVID-19 on local hospitals. Indeed, as noted above, a projection published by the ACLU in late April 2020 showed that absent significant decarceration and social distancing efforts in local jails, total U.S. fatalities could be under-projected by nearly half – amounting to up to *100,000 additional deaths* of people in jail and in the community.<sup>24</sup> Conversely, reducing the flow of people into jails both minimizes the risk of infection for individuals who would have come into contact with the justice system and law enforcement, and enables vital social distancing and quarantine procedures within these facilities.

As gatekeepers to the criminal justice system, prosecutors have broad discretion in deciding whether to prosecute a case, which charges to pursue, whether to seek bail, what plea to offer, and how long a sentence to seek. They thus have a critical role to play in slowing the “front door” to incarceration by using this discretion, as well as by working with police to lower arrests.

### A. Work with Law Enforcement and the Court to Reduce Arrests

Law enforcement should reduce the number of individuals brought into contact with the justice system by building on reforms already made by police departments around the nation that seek to minimize unnecessary arrests and also reduce racial disparities. Early evidence indicates police departments can adopt these reforms to insulate their officers and the community from heightened risk of exposure. Police departments across the country, including in **Los Angeles**,<sup>25</sup> **Denver**,<sup>26</sup> **Philadelphia**,<sup>27</sup> **Fort Worth**,<sup>28</sup> **Phoenix**,<sup>29</sup> and **Chicago**,<sup>30</sup> among other jurisdictions, have moved to significantly reduce arrests in response to the COVID-19 pandemic, without experiencing an increase in crime since doing so: in fact, one analysis found a *reduction* of crime in some big cities that adopted this starting point.<sup>31</sup>

Prosecutors should **work with local law enforcement to avoid arrests and use cite and release policies where appropriate**, unless there is clear evidence that not making an arrest would present a serious public safety risk. They should also encourage probation and law enforcement officials to **suspend arrests of individuals suspected of technical parole or probation**

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<sup>24</sup> American Civil Liberties Union (2020), *COVID-19 Model Finds Nearly 100,000 More Deaths Than Current Estimates Due To Failures To Reduce Jails*, <https://www.aclu.org/report/flattening-curve-why-reducing-jail-populations-key-beating-covid-19?redirect=covidinjails>.

<sup>25</sup> Hernandez, S. (2020), *Los Angeles Is Releasing Inmates Early And Arresting Fewer People Over Fears Of The Coronavirus In Jails*, BuzzFeed News, <https://www.buzzfeednews.com/article/salvadorhernandez/los-angeles-coronavirus-inmates-early-release>.

<sup>26</sup> Schmelzer, E. (2020), *Denver, Boulder law enforcement arresting fewer people to avoid introducing coronavirus to jails*, The Denver Post, <https://www.denverpost.com/2020/03/16/colorado-coronavirus-jails-arrests/>.

<sup>27</sup> Melamed, S., and Newall, M. (2020), *With courts closed by pandemic, Philly police stop low-level arrests to manage jail crowding*, The Philadelphia Inquirer, <https://www.inquirer.com/health/coronavirus/philadelphia-police-coronavirus-covid-pandemic-arrests-jail-overcrowding-larry-krasner-20200317.html>.

<sup>28</sup> Manna, N. (2020), *Fort Worth police will give citations for low-level crimes amid coronavirus outbreak*, Fort Worth Star-Telegram, <https://www.star-telegram.com/news/coronavirus/article241254951.html>.

<sup>29</sup> J. Garcia, U. (2020), *Phoenix police to decrease arrests for nonviolent crimes, chief says*, AZ Central, <https://www.azcentral.com/story/news/local/phoenix/2020/03/24/phoenix-police-decrease-arrests-nonviolent-crimes-chief-jeri-williams-says-coronavirus/2912891001/>.

<sup>30</sup> Smith, P. (2020), *Chicago Police Are Reducing Stops During COVID-19. Activists Want Even Fewer*, National Public Radio, <https://www.npr.org/local/309/2020/03/25/821358187/chicago-police-are-reducing-stops-during-c-o-v-i-d-19-activists-want-even-fewer>.

<sup>31</sup> Weichselbaum, S., and Li, W. (2020), *As Coronavirus Surges, Crime Declines in Some Cities*, The Marshall Project, <https://www.themarshallproject.org/2020/03/27/as-coronavirus-surges-crime-declines-in-some-cities>.



**violations, drug possession, or less serious offenses that pose no risk to the community.** Finally, DAs should also work with the court to **avoid or suspend bench warrants.**

Cite and release is already a tool widely employed by law enforcement to reduce unnecessary arrests: in 2016, approximately 87 percent of police departments reported using citations in lieu of arrests, employing them for nearly a third of all incidents.<sup>32</sup> Amid the current pandemic, many DAs are collaborating with their local police departments to reduce new arrests even further, often in coordination with changes to their own prosecutorial practices. For example, **Ingham County Prosecuting Attorney Carol Siemon** worked with police to limit new arrests and requests for detention to those cases involving domestic violence or other serious offenses which cause bodily harm; these changes have resulted in a reduction of the jail population by over 40 percent.<sup>33</sup> Similarly, **20th Judicial District (Boulder, CO) District Attorney Michael Dougherty** is working with police to limit arrests for low-level property and drug crimes.<sup>34</sup> And **District of Columbia Attorney General Karl Racine** supported local law enforcement's plan to reduce arrests through increased cite and release policies, and worked with the court to temporarily suspend bench warrants in most misdemeanor cases. The AG's office also proactively evaluated cases under its jurisdiction and requested that the court release people who do not appear to pose a danger to the community—resulting in a 65 percent reduction in the local jail population to date.<sup>35</sup>

## **B. Use Prosecutorial Discretion to Limit New Charges and Quickly Resolve Existing Cases**

Elected prosecutors should use their discretion to **refrain from prosecuting low-level cases** and to **dismiss pending low-level charges.** They should **divert individuals,**<sup>36</sup> where appropriate, to local health services and other community providers or diversion programs.<sup>37</sup> In tandem with efforts to limit arrests, these important reforms can substantially reduce the influx of individuals into custody, or the time they spend in custody – and the associated risk of spread of the virus.

Prosecutors have used a variety of measures to limit the volume of new cases. Some DAs, such as **Philadelphia District Attorney Larry Krasner,** are delaying prosecutorial procedures.<sup>38</sup> Others, such as **Kings County District Attorney Eric Gonzalez,**<sup>39</sup> **Baltimore City State's Attorney**

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<sup>32</sup> International Association of Chiefs of Police (2016), *Citation in Lieu of Arrest: Examining Law Enforcement's Use of Citation Across the United States*, <https://www.theiacp.org/sites/default/files/all/i-j/IACP%20Citation%20Final%20Report%202016.pdf>.

<sup>33</sup> Email from Ingham County Prosecuting Attorney Carol Siemon (March 2020).

<sup>34</sup> Schmelzer, E. (2020), *Denver, Boulder law enforcement arresting fewer people to avoid introducing coronavirus to jails*, The Denver Post, <https://www.denverpost.com/2020/03/16/colorado-coronavirus-jails-arrests/>.

<sup>35</sup> Email from District of Columbia Attorney General Karl Racine (March 2020).

<sup>36</sup> Fair and Just Prosecution (2017), *Promising Practices in Prosecutor-Led Diversion*, <https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.Diversion.9.26.pdf>.

<sup>37</sup> A defendant's specific case and the program of a given specialty court should be considered when weighing diversion options. See Fair and Just Prosecution (2019), *Harm Reduction Responses to Drug Use*, [https://fairandjustprosecution.org/wp-content/uploads/2019/08/FJP\\_Brief\\_HarmReduction.pdf](https://fairandjustprosecution.org/wp-content/uploads/2019/08/FJP_Brief_HarmReduction.pdf).

<sup>38</sup> Philadelphia District Attorney's Office (2020), *District Attorney Krasner Announces Acceleration of DAO Reforms in Response to COVID-19 Emergency*, <https://medium.com/philadelphia-justice/district-attorney-krasner-announces-acceleration-of-dao-reforms-in-response-to-covid-19-emergency-e2340f587f25>.

<sup>39</sup> Gonzalez, E. (2020), Twitter, <https://twitter.com/BrooklynDA/status/1239906541182111744>.



**Marilyn Mosby**,<sup>40</sup> and **Cook County State’s Attorney Kim Foxx**,<sup>41</sup> are declining to prosecute certain low-level offenses that do not pose a serious public safety risk.

Prosecutors should also use their discretion to quickly resolve pending cases with a focus on reducing unnecessary incarceration. Specifically, they should work to identify cases that qualify for **early plea deals**, and **consider time served** in plea negotiations. For example, **San Francisco District Attorney Chesa Boudin** issued guidance to his prosecutors to strongly consider credit for time served in plea discussions in light of the ongoing crisis.<sup>42</sup> And **Arlington County and the City of Falls Church Commonwealth’s Attorney Parisa Dehghani-Tafti** is identifying cases that qualify for early and favorable plea offers and speeding up plea negotiations.<sup>43</sup>

### C. Reduce the Pretrial Population

Data reveals that more than 60 percent of those in jail are incarcerated while awaiting trial, and at least 30 percent are behind bars due solely to their inability to afford bail.<sup>44</sup> COVID-19 has prompted some jurisdictions to eliminate the imposition of money bail and reduce unnecessary pretrial detention.<sup>45</sup> Elected prosecutors can and should follow suit, and implement policies supporting pretrial release.<sup>46</sup>

<sup>40</sup> Baltimore City State’s Attorney’s Office (2020), *State’s Attorney Mosby Urges Governor to Take Action on Courts, Prisons and Jails*, <https://www.stattorney.org/media-center/press-releases/1997-state-s-attorney-mosby-urges-governor-to-take-action-on-courts-prisons-and-jails>.

<sup>41</sup> Cook County State’s Attorney (2020), *Statement From Cook County State’s Attorney Kimberly Foxx on Cook County Jail Population*, <https://www.cookcountystatesattorney.org/news/statement-cook-county-state-s-attorney-kimberly-foxx-cook-county-jail-population>.

<sup>42</sup> BondGraham, D. (2020), *San Francisco Officials Push to Reduce Jail Population to Prevent Coronavirus Outbreak*, *The Appeal*, <https://theappeal.org/coronavirus-san-francisco-reduce-jail-population/>.

<sup>43</sup> Dehghani-Tafti, P. (2020), Twitter, <https://twitter.com/parisa4justice/status/1241200647959126016>.

<sup>44</sup> Criminal Justice Policy Program at Harvard Law School (2016), *Moving Beyond Money — A Primer on Bail Reform*, <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>; Center for Court Innovation, *Bail Reform Overview*, <http://www.courtinnovation.org/topic/bail-reform> (“On any given day, an estimated half million people are detained across the U.S. because of an inability to post bail.”). Remaining in jail pending trial has significant consequences, such as loss of employment or housing, increased pressure to accept a plea negotiation, and reinforced racial disparities in incarceration. See, e.g., Stevenson, M. (2017), *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, *The Journal of Law, Economics, and Organization*, <https://academic.oup.com/jleo/article/34/4/511/5100740>. Pretrial detention, moreover, often does not serve its intended public safety purpose: studies have found that even a short stay in pretrial detention is associated with a higher probability of future justice-system involvement. See, e.g., Lowenkamp, C., and VanNostrand, M. (2013), *The Hidden Costs of Pretrial Detention*, The Laura and John Arnold Foundation, [https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF\\_Report\\_hidden-costs\\_FNL.pdf](https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf).

<sup>45</sup> For example, the California Judicial Council, the policymaking branch of the California court system, unanimously issued an emergency order setting bail at \$0 for most misdemeanor and low-level felony charges. Judicial Council of California (2020), *Emergency Rules in Response to the COVID-19 Pandemic*, <https://jcc.legistar.com/View.ashx?M=F&ID=8233133&GUID=4CE2DDDF-426E-446C-8879-39B03DE418B3>.

<sup>46</sup> Fair and Just Prosecution (2017), *Bail Reform*, <https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.BailReform.9.25.pdf>.

**“As this pandemic began to take shape in mid-March, Texas officials swiftly took action to limit the risk of coronavirus infections in our jails and save lives. These are the exact steps that are needed in this time of crisis.”**

— DALLAS COUNTY (TX) DISTRICT ATTORNEY JOHN CREUZOT

Elected prosecutors should minimize the number of people incarcerated pretrial by advocating for the **elimination of cash bail** and **recommending release on recognizance for future cases**, absent clear evidence that release would present a serious public safety risk.

Some DAs are moving to relax the flight-risk components of bail. For example, **Suffolk County District Attorney Rachael Rollins** instituted a presumption for future arrests that cash bail will not be requested and that those charged before trial will be released on their own recognizance,<sup>47</sup> **Philadelphia District Attorney Larry Krasner** has limited pretrial detention to no-bail detention, to be requested only in cases that pose a public safety risk,<sup>48</sup> and **Portsmouth Commonwealth's Attorney Stephanie Morales** changed her office's bail policy to relax the flight-risk component.<sup>49</sup>

Elected prosecutors should also immediately implement a policy requiring line prosecutors to **support the pretrial release of individuals currently detained**, unless there is clear evidence that release would present a serious risk to the physical safety of the community. And **prosecutors should proactively review the status of those currently detained pretrial**, and where appropriate, support mechanisms that would enable release. Specifically, bail that was imposed on the basis of **flight risk should be re-assessed**.

Some, like **Arlington County and the City of Falls Church Commonwealth's Attorney Parisa Dehghani-Tafti**, are proactively reexamining bail applications and working with the sheriff to take a second look at cases in which bond was previously imposed over her office's objections.<sup>50</sup> Similarly, **Dallas County District Attorney John Cruzot** is identifying individuals in jail who cannot post bond, to have a judge determine if they can be released. Additionally, his office is dismissing complaints of people detained on low-level misdemeanor or felony drug charges for which a laboratory report has not been completed.<sup>51</sup>

Others are focusing on identifying and releasing specific groups of people held pretrial. Emergency procedures implemented by the chief judge in consultation with **13th Judicial Circuit (Tampa, FL) State Attorney Andrew Warren**<sup>52</sup> and the County Sheriff's Office permit the release of certain people held pretrial who do not pose a public safety threat, **Albemarle County Commonwealth's Attorney Jim Hingeley** moved to release detained individuals who are at high risk of contracting COVID-19 to home electronic incarceration at no cost to them,<sup>53</sup> and **St. Louis County Prosecuting Attorney Wesley Bell** is advocating for the release of those held pretrial and

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<sup>47</sup> Fortier, M. (2020), *Suffolk DA Plans to Release Low-Risk Prisoners Amid Coronavirus Outbreak*, NBC Boston, <https://www.nbcboston.com/news/local/suffolk-da-plans-to-release-low-risk-prisoners-amid-coronavirus-outbreak/2093843/>.

<sup>48</sup> Philadelphia District Attorney's Office (2020), *District Attorney Krasner Announces Acceleration of DAO Reforms in Response to COVID-19 Emergency*, <https://medium.com/philadelphia-justice/district-attorney-krasner-announces-acceleration-of-dao-reforms-in-response-to-covid-19-emergency-e2340f587f25>.

<sup>49</sup> Call with Portsmouth Commonwealth's Attorney Stephanie Morales (March 2020).

<sup>50</sup> Dehghani-Tafti, P. (2020), Twitter, <https://twitter.com/parisa4justice/status/1241200647959126016>.

<sup>51</sup> Call with Dallas County District Attorney John Cruzot (March 2020).

<sup>52</sup> Office of the State Attorney, 13th Judicial Circuit (2020), *Statement: Changes to Criminal Prosecutions in Response to Coronavirus*, <https://www.sao13th.com/2020/03/statement-regarding-changes-to-criminal-prosecutions-in-response-to-coronavirus/>.

<sup>53</sup> Stuart, C. (2020), *ACRJ takes precautions amid pandemic*, CBS19 News, <https://www.cbs19news.com/story/41916971/acrj-takes-precautions-amid-pandemic>.

charged with low-level or nonviolent offenses.<sup>54</sup>

In pretrial release, prosecutors should request the **least restrictive conditions**. For example, they should avoid the use of **ankle monitors**, especially those that pass costs on to the individuals, and exercise caution in the use of **risk assessment tools**, many of which have been associated with perpetuating racial disparities.<sup>55</sup> And just as it would be unconscionable to imprison individuals due to homelessness, people should not be detained simply because they do not have a home to return to.<sup>56</sup>

## II. Identify and Seek Release of Those Serving Sentences to Minimize Risk of Disease Spread

Immediately shrinking the jail and prison population is a necessary step to mitigate the rapid spread of COVID-19 through correctional facilities. Elected prosecutors have begun working in collaboration with public defenders, court personnel, and other criminal justice stakeholders to **evaluate and seek the release of individuals sentenced** to serve time in local jails<sup>57</sup> who do not pose a serious threat to public safety, with a focus on those medically vulnerable to serious illness from COVID-19. In addition to these critical efforts, prosecutors should **revisit lengthy sentences** through the establishment of systematic reforms like sentencing review units and second-look mechanisms. Further, more prosecutors should urge their respective governors – who have broad authority to grant relief from sentences – to release as many individuals from state prisons as can be safely returned to the community.<sup>58</sup>

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<sup>54</sup> Associated Press (2020), *Bell and Gardner announce steps to ease jail crowding*, [https://www.stltoday.com/lifestyles/health-med-fit/coronavirus/bell-and-gardner-announce-steps-to-ease-jail-crowding/article\\_454d9d1d-f0b1-5537-856f-dfb13c002aa1.html](https://www.stltoday.com/lifestyles/health-med-fit/coronavirus/bell-and-gardner-announce-steps-to-ease-jail-crowding/article_454d9d1d-f0b1-5537-856f-dfb13c002aa1.html).

<sup>55</sup> Center for Court Innovation (2019), *Beyond the Algorithm: Pretrial Reform, Risk Assessment, and Racial Fairness*, [https://www.courtinnovation.org/sites/default/files/media/document/2019/Beyond\\_The\\_Algorithm.pdf](https://www.courtinnovation.org/sites/default/files/media/document/2019/Beyond_The_Algorithm.pdf); Angwin, J., Larson, J., Mattu, S., and Kirchner, L. (2016), *Machine Bias*, ProPublica, <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>.

<sup>56</sup> While jail should not be a substitute for lack of housing, homelessness is not a solution. Instead, prosecutors should work with other stakeholders to secure safe and free housing for people reentering the community.

<sup>57</sup> Local jails house individuals awaiting trial. In addition, many sentences – particularly shorter ones – are served in local jails, just as people near the end of their sentence may end up housed in a local jail. The recommendations in this brief also address ways to safely release individuals serving sentences in prison, although those decisions are more commonly in the hands of state officials, including governors and parole and clemency boards. For more on release mechanisms by state, see, e.g., The Restoration of Rights Project (2020), *50-State Comparison: Pardon Policy & Practice*, <http://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities-2/>.

<sup>58</sup> Prior research has found that nearly 40 percent of the prison population is behind bars without a public safety rationale. See Eisen, L.B., Austin, J., Cullen, J., Frank, J., and Chettiar, I. (2016), *How Many Americans Are Unnecessarily Incarcerated?*, Brennan Center for Justice, <https://www.brennancenter.org/our-work/research-reports/how-many-americans-are-unnecessarily-incarcerated>.

***“We all have a responsibility to try to stem the spread of COVID-19. Releasing individuals who do not pose a danger to the public can prevent them from being exposed in prison, create a safer environment for those who remain there, and help protect our entire community during this pandemic.”***

## A. Develop Partnerships to Help Identify Individuals to Release From Jail

Elected DAs should work with<sup>59</sup> defense attorneys, advocates, sheriffs, corrections officials, and the state Attorney General to **evaluate, identify, and seek immediate release of all individuals who do not pose a serious threat to public safety** and can be safely returned to the community.<sup>60</sup> Elected prosecutors should also work with legislative leaders to **expand the upper limits of good time credit**, with sheriffs to suspend the requirements of **individuals serving weekends or on work release**, and consider joining in **legal actions** seeking expanded release.

Prosecutors are using a variety of approaches to identify and seek release of specific groups of individuals in custody, including:

- **Individuals who are medically vulnerable to COVID-19**, per guidelines from the CDC, including the elderly, those with asthma, cancer, heart disease, lung disease, diabetes, individuals who are immunocompromised, and those with other underlying conditions. For example, **Durham County District Attorney Satana Deberry** initiated regular reviews of the jail population in a proactive collaboration with other criminal justice stakeholders to identify individuals who could be safely released, including those with health conditions that render them susceptible to serious illness from COVID-19.<sup>61</sup>
- **Individuals who have a short amount of time left in their sentence.** While many of these efforts focus on people with 30 to 45 days remaining in their sentence, **Loudoun County Commonwealth's Attorney Buta Biberaj** is working with local stakeholders to identify people in county jail with less than 6 months left for consideration of early release.<sup>62</sup>
- **Individuals behind bars on account of technical violations of probation or parole or failure to appear.** For example, **Dallas County District Attorney John Creuzot** is working with stakeholders to identify and review for possible release those in jail who may be incarcerated for a technical violation of probation.<sup>63</sup>
- Others are identifying and reviewing for possible release other sentenced individuals in jail, including those who **do not pose a serious public safety risk**, who are held on certain misdemeanor charges, and who are serving weekend sentences.

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<sup>59</sup> For a description of prosecutorial authority relative to the authority of other criminal justice stakeholders, particularly amid the current pandemic, see, e.g., V. Demleitner, N. (2020), *State Prosecutors at the Center of Mass Imprisonment and Criminal Justice Reform*, Federal Sentencing Reporter, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3574974](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3574974).

<sup>60</sup> Prosecutors seeking the release of people behind bars can point to actions by other criminal justice stakeholders across the country. For example, in New Jersey, Chief Justice Rabner ordered the temporary release of up to 1,000 individuals serving sentences in local jails, "formaliz[ing] an agreement among the New Jersey Public Defender's Office, state Attorney General's Office, County Prosecutors Association and American Civil Liberties Union of New Jersey." See, e.g., Hopkins, K. (2020), *Coronavirus in NJ: Up to 1,000 inmates to be released from jails*, Asbury Park Press, <https://www.app.com/story/news/2020/03/23/nj-coronavirus-up-1-000-inmates-released-jails/2897439001/>. And, as described in Section II, Subsection C, some governors across the country are exercising their relief powers to ensure vulnerable incarcerated individuals are returned to the community.

<sup>61</sup> Durham District Attorney's Office (2020), *Statement from Durham County District Attorney Satana Deberry on Detention Facility Population and COVID-19*, <https://medium.com/durham-district-attorneys-office/statement-from-durham-county-district-attorney-satana-deberry-on-detention-facility-population-and-f1cd4a31acac>.

<sup>62</sup> Interview with Loudoun County Commonwealth's Attorney Buta Biberaj (April 2020).

<sup>63</sup> Interview with Dallas County District Attorney John Creuzot (April 2020).

In addition to identifying and reviewing specific groups of people for potential release, some prosecutors are supporting legislation that gives additional discretion to **award good time credits** to incarcerated individuals,<sup>64</sup> joining petitions seeking the release of incarcerated individuals,<sup>65</sup> or reviewing cases brought to the office by family members or counsel to see if **early release** is appropriate.<sup>66</sup>

Several elected prosecutors are combining elements of the above approaches to shrink the jail population to facilitate social distancing. For example, **Milwaukee County District Attorney John Chisholm** is working with the public defender, sheriff, head of the local correction facility and the state Department of Corrections to reduce jail capacity to ensure private cells,<sup>67</sup> and as of early April, jail capacity was down nearly 25 percent.<sup>68</sup> **District Attorney Natasha Irving, 6th Prosecutorial District (Wiscasset, ME)**, is working with sheriffs and the state judiciary to achieve a jail population below 50 percent capacity and ensure that only people who pose a significant threat to public safety remain incarcerated.<sup>69</sup> Efforts by **Commonwealth's Attorney Jim Hingeley in Albemarle County, Virginia** have resulted in a reduction of his jurisdiction's jail population to the lowest level in at least two decades.<sup>70</sup> And **Ramsey County Attorney John Choi** worked with local stakeholders to obtain court orders giving broad discretion to determine who is medically vulnerable, and to release all those considered medically vulnerable or serving low-level, nonviolent offenses from jail for completion of their sentence, reducing the County's jail population by over 50 percent in two weeks.<sup>71</sup>

Other jurisdictions across the country have significantly reduced jail populations, underscoring the extent to which decarceration is possible. For example, Cleveland<sup>72</sup> reduced its jail population by 50 percent in just over two weeks; Cincinnati<sup>73</sup> reduced its jail population by one-third; and Denver reduced its jail population by 48 percent.<sup>74</sup>

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<sup>64</sup> Email from District of Columbia Attorney General Karl Racine (May 2020).

<sup>65</sup> Mass. High Court Rules Some Prisoners Will Be Eligible For Release Due To COVID-19 (2020), WBUR, <https://www.wbur.org/news/2020/04/03/sjc-prisoners-emergency-petition-ruling>.

<sup>66</sup> Interview with Second Judicial District (Denver, CO) District Attorney Beth McCann (April 2020).

<sup>67</sup> Email from Milwaukee County District Attorney John Chisholm (March 2020).

<sup>68</sup> Vielmetti, B. (2020), *Early releases free up isolation space, improve distancing at jails*, Milwaukee Journal Sentinel, <https://www.jsonline.com/story/news/crime/2020/04/06/coronavirus-wisconsin-early-jail-releases-free-up-isolation-space/2950986001/>.

<sup>69</sup> Email from 6th Prosecutorial District (Wiscasset, ME) District Attorney Natasha Irving (May 2020).

<sup>70</sup> Hitchcock, B. (2020), *Get out of jail virus-free: Coronavirus crisis sees local justice system adopt progressive reforms, for now*, <https://www.c-ville.com/get-out-of-jail-virus-free-coronavirus-crisis-sees-local-justice-system-adopt-progressive-reforms-for-now/>.

<sup>71</sup> Email from Ramsey County Attorney John Choi (March 2020).

<sup>72</sup> Williams, T., Weiser, B., and Rashbaum, W. (2020), *'Jails Are Petri Dishes': Inmates Freed as the Virus Spreads Behind Bars*, The New York Times, <https://www.nytimes.com/2020/03/30/us/coronavirus-prisons-jails.html>.

<sup>73</sup> Swartsell, N. (2020), *Will Hamilton County Change How it Jails People in the Wake of the Coronavirus? Some Officials Hope So*, CityBeat, <https://www.citybeat.com/news/blog/21128172/will-hamilton-county-change-how-it-jails-people-in-the-wake-of-the-coronavirus-some-officials-hope-so>.

<sup>74</sup> Email from Second Judicial District (Denver, CO) District Attorney Beth McCann (May 2020).

## B. Take a Second Look at Lengthy Prison Sentences

Efforts by prosecutors to identify and release classes of individuals to date have largely focused on local jails, with critical and lifesaving results.<sup>75</sup> But it is equally important that elected DAs engage in advocacy and promote actions to reduce state prison populations, where approximately 56 percent of the national incarcerated population is held.<sup>76</sup> This is particularly true because many elderly individuals, who are among the most vulnerable to COVID-19, are currently serving lengthy prison sentences for serious crimes committed decades ago, though they no longer pose a risk to the community. A vast body of data has established that many incarcerated individuals have “aged out” of criminal behavior<sup>77</sup> and that harsher sentences in general do not deter crime. Moreover, overly harsh sentences handed down during the “tough on crime” era have historically, and continue to, disproportionately impact communities of color. In this context, it is critical that DAs and other leaders not rely only on the crime an individual originally was convicted of when weighing release or sentence review. These second chances can come about through various mechanisms for review of past sentences that may be available in the local jurisdiction.

Increasingly and importantly, some prosecutors are initiating review of individuals in state prison for possible reductions of previously imposed sentences. For example, **Durham County District Attorney Satana Deberry** is working with local community groups to identify and, where appropriate, support motions for sentence modifications to release individuals in state prisons who are at high risk of contracting COVID-19 due to their age, those who were convicted of certain crimes, and people who have upcoming release dates. Her office is also accelerating the review of such motions filed prior to the pandemic.<sup>78</sup> Additionally, several prosecutors are supporting or advocating for early parole as another mechanism to achieve release for people who have served long sentences.<sup>79</sup>

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<sup>75</sup> The ACLU’s April projection on the relationship between jails and nationwide efforts to flatten the curve showed Colorado’s statewide jail population decline of 31 percent will result in up to approximately 1,100 lives saved (or 25 percent of projected deaths in the state avoided). See American Civil Liberties Union (2020), *COVID-19 Model Finds Nearly 100,000 More Deaths Than Current Estimates Due To Failures To Reduce Jails*, <https://www.aclu.org/report/flattening-curve-why-reducing-jail-populations-key-beating-covid-19?redirect=covidinjails>.

<sup>76</sup> Prison Policy Initiative (2020), *Mass Incarceration: The Whole Pie 2020*, <https://www.prisonpolicy.org/reports/pie2020.html>.

<sup>77</sup> Snyder, H.N. (2012), *Arrest in the United States, 1990-2010*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, <https://www.bjs.gov/content/pub/pdf/aus9010.pdf>; Fair and Just Prosecution (2019), *Young Adults in the Justice System*, [https://fairandjustprosecution.org/wp-content/uploads/2019/01/FJP\\_Brief\\_YoungAdults.pdf](https://fairandjustprosecution.org/wp-content/uploads/2019/01/FJP_Brief_YoungAdults.pdf).

<sup>78</sup> Durham District Attorney’s Office (2020), *Statement from DA Satana Deberry on Prison Population and COVID-19*, <https://medium.com/durham-district-attorneys-office/statement-from-da-satana-deberry-on-prison-population-and-covid-19-c2265f3bbb59>.

<sup>79</sup> See, e.g., Philadelphia District Attorney’s Office (2020), *District Attorney Krasner Announces Acceleration of DAO Reforms in Response to COVID-19 Emergency*, <https://medium.com/philadelphia-justice/district-attorney-krasner-announces-acceleration-of-dao-reforms-in-response-to-covid-19-emergency-e2340f587f25>; Suffolk County District Attorney’s Office (2020), *Letter from DA Rollins to Governor Baker Urging Action to Reduce Incarcerated Population Amid COVID-19 Pandemic*, <https://www.suffolkdistrictattorney.com/press-releases/items/2020/5/1/letter-from-da-rollins-to-governor-baker-urging-action-to-reduce-incarcerated-population-amid-covid-19-crisis>.

**“Statewide, we’re not doing enough when it comes to our response to COVID-19. This outbreak is an opportunity for us to re-examine the way that we do things and come together across legal divides to find common ground.”**

— FAIRFAX COUNTY (VA) COMMONWEALTH’S ATTORNEY STEVE DESCANO



In addition to conducting immediate sentencing review focused on releasing people in response to the COVID-19 pandemic, elected DAs should create a **sentencing review unit or a sentencing review process to proactively identify appropriate cases and support release**, and maintain this unit or process moving forward.<sup>80</sup> Such a sentencing review unit or process can both **address excessive sentences** for individuals currently behind bars and also **support pardons or expungement** for individuals facing collateral consequences, such as immigration consequences from an old conviction.

For example, **King County Prosecuting Attorney Dan Satterberg** has successfully advocated for clemency for twenty-one individuals over the course of a decade, many of whom received life sentences under the state's "three-strikes" law.<sup>81</sup> And **Kings County District Attorney Eric Gonzalez** established a new Parole and Clemency Unit within his office's Post-Conviction Justice Bureau in 2019, which, among other things, responds to clemency applications from the governor's office, defaults to the consent of parole at the earliest opportunity for individuals who entered plea deals, and considers supporting parole for individuals who received lengthy sentences at trial for offenses committed at age 23 or younger.<sup>82</sup>

### C. Advocate for Sentencing Review Mechanisms and Sentencing Reforms

As part of their mandate to promote both public safety and justice, elected prosecutors should actively support and encourage efforts by other criminal justice stakeholders to enable the reconsideration of past extreme sentences.<sup>83</sup> The COVID-19 pandemic has made these efforts even more urgent. To that end, elected DAs should **advocate for reforms that enable past lengthy sentences to be revisited** and support release for those individuals who can safely return to the community, noting the connection between evolving sentencing norms, overcrowding, and the current crisis. There is broad public support for such reform: a recent poll found that more than two thirds of likely voters support second look legislation "for people who have been in prison for more than ten years and who can be safely returned to the community."<sup>84</sup>

In particular, elected prosecutors should **support and advocate for the passage of "second look" legislation**, whether in the form of a law to allow prosecutors or other stakeholders to identify cases for second look proceedings, or to allow individuals to apply for a sentence reduction. **Washington State** recently passed a law<sup>85</sup> granting "prosecutors the discretion to petition the court to resentence an individual if the person's sentence no longer advances the

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<sup>80</sup> For more on these reforms, see Fair and Just Prosecution (2020), *Revisiting Past Extreme Sentences: Sentencing Review and Second Chances*, [https://fairandjustprosecution.org/wp-content/uploads/2020/02/FJP\\_Issue-Brief\\_SentencingReview.pdf](https://fairandjustprosecution.org/wp-content/uploads/2020/02/FJP_Issue-Brief_SentencingReview.pdf).

<sup>81</sup> Radil, A. (2019), *King County prosecutors help cut 'breath-taking' prison sentence*, KUOW, <https://www.kuow.org/stories/king-county-prosecutors-help-cut-breath-taking-prison-sentence>; The Seattle Times (2018), *The Times recommends: Dan Satterberg for King County Prosecuting Attorney*, <https://www.seattletimes.com/opinion/editorials/the-times-recommends-dan-satterberg-for-king-county-prosecuting-attorney/>; Interview with Carla Lee (2019), Deputy Chief of Staff, King County Prosecuting Attorney's Office.

<sup>82</sup> Robbins, T. (2019), *Took a Plea? Brooklyn's District Attorney Will Support Your Parole*, The Marshall Project, <https://www.themarshallproject.org/2019/04/17/took-a-plea-brooklyn-s-district-attorney-will-support-your-parole>.

<sup>83</sup> Fair and Just Prosecution (2020), *Revisiting Past Extreme Sentences: Sentencing Review and Second Chances*, [https://fairandjustprosecution.org/wp-content/uploads/2020/02/FJP\\_Issue-Brief\\_SentencingReview.pdf](https://fairandjustprosecution.org/wp-content/uploads/2020/02/FJP_Issue-Brief_SentencingReview.pdf).

<sup>84</sup> Data for Progress, The Justice Collaborative, and Fair and Just Prosecution (2020), *Policies and Polling on Reducing Excessive Prison Terms*, <http://filesforprogress.org/memos/reducing-excessive-prison-sentences.pdf>.

<sup>85</sup> *Senate Bill 6164*, 66th Legislature, 2020 Regular Session, State of Washington, <http://lawfilesexext.leg.wa.gov/biennium/2019-20/Pdf/Bills/Senate%20Passed%20Legislature/6164.PL.pdf?q=20200416075332>.



interests of justice,” with the support of **King County Prosecuting Attorney Dan Satterberg**. Similarly, **California**,<sup>86</sup> **Indiana**, **New York**,<sup>87</sup> (with the support of **Kings County District Attorney Eric Gonzalez**), and **Vermont**,<sup>88</sup> (with the support of **Chittenden County State’s Attorney Sarah George**) have or are considering similar legislation.

Elected prosecutors should also be more active in **urging their state governor to release as many individuals as can be safely returned to the community**. In most states, governors have broad authority to grant relief from sentences through pardons or commutations with permanent effect, or through reprieves, which temporarily modify a sentence. In addition to responding to individual requests for pardons, governors should help identify and release categories of individuals from prison.

Approximately 10 governors have taken some kind of action to release people in prison as of early May 2020,<sup>89</sup> showing the potential of this mechanism, but leaving substantial room for additional, critical gubernatorial action across the country.<sup>90</sup>

Elected DAs can use their “bully pulpit” to **encourage governors to act**. For example, **Baltimore City State’s Attorney Marilyn Mosby** wrote a letter urging Maryland Governor Larry Hogan to release vulnerable populations to supervised release or parole, accelerate release of those approved for parole, prohibit additional detention for parole violations, increase resources to address commutation applications, and reduce unnecessary parole and probation check-ins.<sup>91</sup> In an Executive Order the next month, Governor Hogan expedited release to supervision, home

<sup>86</sup> Assembly Bill 2942, 2018, State of California, [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=201720180AB2942](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB2942); Sentence Review, *Frequently Asked Questions*, <https://www.sentencereview.org/faq>.

<sup>87</sup> Tali Farhadian Weinstein, General Counsel of the Kings County District Attorney’s Office, also penned an op-ed lifting up second look legislation. Weinstein, T.F. (2020), *Curing our epidemic of incarceration: Learning to let more New Yorkers out of prison, during and after the coronavirus crisis*, New York Daily News, <https://www.nydailynews.com/opinion/ny-oped-curing-our-epidemic-of-incarceration-20200401-sanoyrz45re4jfkphs2xmoooua-story.html>.

<sup>88</sup> Email with Chittenden County State’s Attorney Sarah George (March 2020).

<sup>89</sup> Dolovich, S., *UCLA Law Covid-19 Behind Bars Data Project*, [https://docs.google.com/spreadsheets/d/1X6uJkXXS-O6eePLxw2e4JeRtM41uPZ2eRcOA\\_HkPVTk/edit?pli=1#gid=845601985](https://docs.google.com/spreadsheets/d/1X6uJkXXS-O6eePLxw2e4JeRtM41uPZ2eRcOA_HkPVTk/edit?pli=1#gid=845601985).

<sup>90</sup> For example, California Governor Gavin Newsom announced that the state is accelerating release of up to 6,500 people who are in prisons, Kentucky Governor Andy Beshear announced that he would commute the sentences of nearly 1,000 people in prison who are serving time for certain crimes and who have health conditions, and Pennsylvania Governor Tom Wolf announced that up to 1,800 people high-risk for serious illness from COVID-19 in state prison would be offered temporary reprieves. See, e.g., St. John, P. (2020), *California to release 3,500 inmates early as coronavirus spreads inside prisons*, Los Angeles Times, <https://www.latimes.com/california/story/2020-03-31/coronavirus-california-release-3500-inmates-prisons>; Planalp, B. (2020), *Nearly 1,000 Kentucky prison sentences to be commuted, Beshear says*, Fox 19, <https://www.fox19.com/2020/04/02/watch-live-gov-beshear-provides-update-covid-kentucky/>; Roebuck, J., McCarthy, E., and Orso, A. (2020), *Thousands of state prison inmates in Pa. and N.J. are now eligible for temporary release as governors act to avert coronavirus spread*, The Philadelphia Inquirer, <https://www.inquirer.com/health/coronavirus/coronavirus-prisoners-pennsylvania-new-jersey-governor-wolf-murphy-20200410.html>.

<sup>91</sup> Zumer, B. (2020), *Marilyn Mosby urges Gov. Hogan to take action to fight coronavirus in jails*, Fox 5 News, <https://foxbaltimore.com/news/coronavirus/marilyn-mosby-urges-gov-hogan-to-take-action-to-fight-coronavirus-in-jails>.

**“Jails and prisons are landlocked cruise ships, with people in extremely close quarters and supplies such as soap and sanitation products drying up. Safely and swiftly depopulating corrections facilities is a matter of life or death for all of us.”**

— PHILADELPHIA (PA) DISTRICT ATTORNEY LARRY KRASNER

detention, or parole for hundreds of incarcerated individuals scheduled to be released within the next four months.<sup>92</sup> Similarly, **Kauai County Prosecuting Attorney Justin Kollar** wrote a letter to Hawaii Governor David Ige urging him to provide for emergency release for individuals with five years or less on their sentence for those at risk – older individuals and those with underlying health conditions – and to release to parole individuals with two years or less remaining on their sentence who do not pose a public safety risk.<sup>93</sup> And **Suffolk County District Attorney Rachael Rollins** sent a letter to Massachusetts Governor Charlie Baker asking him to decarcerate through his powers of clemency, accelerate parole proceedings, and increase testing capacity.<sup>94</sup>

## SUMMARY OF RECOMMENDATIONS<sup>95</sup>

### I. Limit the Front Door: Slow the Influx of Individuals Into Custody and Minimize Contact with the Criminal Justice System

#### A. Work with Law Enforcement and the Court to Reduce Arrests

- **Work with local law enforcement to avoid arrests and use cite and release policies where appropriate**, unless there is clear evidence that not making an arrest would present a serious public safety risk.
- Encourage probation and law enforcement officials to **suspend arrests of individuals suspected of technical parole or probation violations, drug possession, or less serious offenses that pose no risk to the community**.
- Work with the court to **avoid or suspend bench warrants**.

#### B. Use Prosecutorial Discretion to Limit New Charges and Quickly Resolve Existing Cases

- Use prosecutorial discretion to **refrain from prosecuting low-level cases**, and **dismiss pending low-level charges**.
- **Divert individuals**, where appropriate, to local health services and other community providers or diversion programs.
- Quickly resolve pending cases with a focus on reducing unnecessary incarceration – work to identify cases that qualify for **early plea deals**, and **consider time served** in plea negotiations.

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<sup>92</sup> CBS Baltimore (2020), *Coronavirus Latest: Gov. Hogan Signs Executive Order To Expedite Release Of Hundreds Of Inmates In Md. Correctional Institutions*, <https://baltimore.cbslocal.com/2020/04/19/coronavirus-latest-gov-hogan-signs-executive-order-to-expedite-release-of-hundreds-of-inmates-in-md-correctional-institutions>.

<sup>93</sup> The Appeal (2020), Twitter, <https://twitter.com/theappeal/status/1242635301891145728>.

<sup>94</sup> Suffolk County District Attorney's Office (2020), *Letter from DA Rollins to Governor Baker Urging Action to Reduce Incarcerated Population Amid COVID-19 Pandemic*, <https://www.suffolkdistrictattorney.com/press-releases/items/2020/5/1/letter-from-da-rollins-to-governor-baker-urging-action-to-reduce-incarcerated-population-amid-covid-19-crisis>.

<sup>95</sup> These and other recommendations are also included in a statement that more than 40 elected prosecutors – many of whom are referenced in this Issue Brief – signed onto in March, 2020. See Fair and Just Prosecution (2020), *Joint Statement From Elected Prosecutors on COVID-19 and Addressing the Rights and Needs of Those in Custody*, <https://fairandjustprosecution.org/wp-content/uploads/2020/03/Coronavirus-Sign-On-Letter.pdf>.

### C. Reduce the Pretrial Population

- Minimize the number of people incarcerated pretrial by advocating for the **elimination of cash bail and recommending release on recognizance**, absent clear evidence that release would present a serious public safety risk.
- Immediately implement a policy requiring line prosecutors to **support the pretrial release of individuals currently detained**, unless there is clear evidence that release would present a serious risk to the physical safety of the community.
- Proactively **review the status of those currently detained pretrial**, and where appropriate, seek a bond mechanism that would enable release. Reassess bail that was imposed on the basis of flight risk.
- In pretrial release, request the **least restrictive conditions**. **Avoid** the use of **ankle monitors**, especially those that pass costs on to the individuals, and exercise caution in the use of **risk assessment tools**, many of which have been associated with perpetuating racial disparities.

## II. Identify and Seek Release of Those Serving Sentences to Minimize Risk of Disease Spread

### A. Develop Partnerships to Help Identify Individuals to Release From Jail

- Work with defense attorneys, advocates, sheriffs, corrections officials, and the state Attorney General to **evaluate, identify, and seek immediate release of all individuals who do not pose a serious threat to public safety**.
- Work with legislative leaders to **expand the upper limits of good time credit**, with sheriffs to suspend the requirements of **individuals serving weekends or on work release**, and consider joining in **legal actions** seeking expanded release.

### B. Take a Second Look at Lengthy Prison Sentences

- Conduct immediate sentencing review focused on releasing people from prison who are medically vulnerable and pose no serious public safety risk.
- Create a **sentencing review unit or a sentencing review process to proactively identify appropriate cases and support release**, and maintain this unit or process moving forward.

### C. Advocate for Sentencing Review Mechanisms and Sentencing Reforms

- **Advocate for reforms, including “second look legislation,” that enable past lengthy sentences to be revisited.**
- Support release for individuals who can safely return to the community and **urge state governors to release as many individuals as can be safely returned to the community.**

## CONCLUSION

Amid the rapid and deadly spread of COVID-19 through jails and prisons across the country – and through the broader community – the need to shrink jail and prison populations has become urgent. Elected prosecutors, whose duty is to protect the safety and wellbeing of all members of the community, should lead these efforts in collaboration with other criminal justice stakeholders. Many prosecutors across the country recognize the dire situation and have begun working to reduce the influx of individuals into custody and advocate for release of those in jails who can be safely returned to the community. Some are also assisting in securing the release of people in state prisons and those serving lengthy sentences. More prosecutors should embrace these efforts at this critical moment in time when lives are at stake and the death toll is mounting.

But these long overdue measures should not end with the pandemic. Decades of research have established that tough-on-crime approaches are ineffective and have adverse impacts on public health, public safety, socioeconomic and racial inequities, community trust, and the economy. The reforms adopted in response to the COVID-19 pandemic, therefore, can and should be part of a set of long-lasting and overdue systemic justice system reforms.

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