



COVID-19 and the Criminal Justice System: Improving Conditions of Confinement and Protecting Constitutional Rights

Fair and Just Prosecution (FJP) brings together recently elected district attorneys¹ 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 part of a series examining unfolding criminal justice system responses to the public health crisis created by the novel coronavirus (COVID-19).² This brief addresses how prosecutors can help preserve and protect the health and rights of people who remain behind bars amid the pandemic. As prosecutors pursue critical decarceral strategies in response to the threat posed by COVID-19, they should simultaneously take steps to ensure that people who remain in custody receive recommended public health protections, access needed treatment and healthcare, and are afforded their full constitutional rights. This brief provides recommendations for how prosecutors can promote such actions in partnership with other community and correctional leaders, justice system stakeholders, and public health officials, and spotlights examples of prosecutorial leadership and innovation on these issues.

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

² The first brief in this series, *COVID-19 and the Criminal Justice System: Reducing and Avoiding Incarceration During a Pandemic*, is available at: https://fairandjustprosecution.org/wp-content/uploads/2020/05/FJP_Issue-Brief_Covid-19.pdf; the second brief in this series, *COVID-19 and the Criminal Justice System: Youth Justice Issues, Challenges, and Recommended Reforms*, is available at: https://fairandjustprosecution.org/wp-content/uploads/2020/08/FJP_Brief_Covid_YouthJustice.pdf. For more resources, see Fair and Just Prosecution (2020), *COVID-19 and Mass Incarceration: Crisis and Solutions*, <https://fairandjustprosecution.org/covid-19/crisis-and-solutions/>.

BACKGROUND

The COVID-19 pandemic has exacerbated dangerous conditions in jails, prisons, and immigration detention facilities. The effects of mass incarceration – including rampant overcrowding, an aging and medically vulnerable prison population, and inadequate healthcare – have long resulted in substandard care in prisons and jails. Densely populated and unsanitary conditions make correctional facilities conducive to disease spread, which they are ill-equipped to cope with. Moreover, incarcerated individuals cannot practice hygiene and social distancing measures recommended by the Centers for Disease Control and Prevention (CDC) to mitigate the spread of COVID-19 behind bars: access to face masks and cleaning supplies is restricted, overcrowding is rampant, and shared spaces are unavoidable. These conditions render prisons and jails deadly “Petri dishes” for COVID-19.

As a result, and not surprisingly, the virus has spread through custodial settings across the country with alarming speed. As of August 27th, 2020, more than 150,000 people in prisons and jails had tested positive for COVID-19.³ The rate of infection in custodial settings far eclipses the rate in the broader community; for instance, in Ohio, the rate of cases among people in prison was 5,289 percent higher than in the state overall.⁴ Even these stark figures may understate the problem; many states limit testing to symptomatic incarcerated people. Those state correctional facilities that have conducted mass testing have found widespread and largely asymptomatic infection. Indeed, reported rates of COVID-19 in state facilities that conducted mass testing were as high as 80 percent.⁵ As of August 27th, 2020, the nation’s thirteen largest COVID-19 hot spots were all correctional facilities.⁶

Because COVID-19 is highly communicable, outbreaks in prisons and jails threaten not only the well-being of people who are incarcerated, but also correctional staff and their families, as well as the broader communities to which they return at the end of each shift. The implications are dire: an April 2020 ACLU projection found that, absent significant decarceration and social distancing efforts in local jails, there could be up to 100,000 additional deaths in the United States.⁷ This acute public health crisis has motivated reforms to address the threat of outbreaks in prisons and jails, including proactive decarceration efforts led by prosecutors, courts, sheriffs, and other justice system stakeholders. But far more remains to be done.⁸

Decarceration has not been adopted evenly or consistently across the justice system, underscoring the need for continued reform and for a renewed focus on the *conditions of confinement* for those who cannot safely be returned to the community. As of mid-May 2020, while many local

³ 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>.

⁴ The Marshall Project (2020), *A State-By-State Look At Coronavirus in Prisons*, <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>.

⁵ So, L. and Smith, G. (2020), *In four U.S. state prisons, nearly 3,300 inmates test positive for coronavirus – 96% without symptoms*, Reuters, <https://www.reuters.com/article/us-health-coronavirus-prisons-testing-in/in-four-us-state-prisons-nearly-3300-inmates-test-positive-for-coronavirus-96-without-symptoms-idUSKCN2270RX>.

⁶ The New York Times, *supra* note 3.

⁷ American Civil Liberties Union (2020), *COVID-19 Model Finds Nearly 100,000 More Deaths Than Current Estimates Due To Failures To Reduce Jails*, 10, <https://www.aclu.org/report/flattening-curve-why-reducing-jail-populations-key-beating-covid-19?redirect=covidinjails>.

⁸ For more, see FJP’s recent issue brief: [COVID-19 and the Criminal Justice System: Reducing and Avoiding Incarceration During a Pandemic](#).

jails had reduced their populations by 30 percent or more, many state and federal prisons had only incrementally reduced their incarcerated populations, if at all.⁹ Alarming, data as of late June 2020 suggested a return to pre-pandemic policing policies in certain jurisdictions, increasing incarcerated populations anew, even amid the ongoing and worsening pandemic.¹⁰

THE PROSECUTOR'S ROLE AND RESPONSIBILITY IN PROTECTING THE SAFETY, RIGHTS, AND WELL-BEING OF PEOPLE BEHIND BARS

As elected officials responsible for protecting the safety and well-being of *all* members of the community, elected prosecutors should advocate for systemic reforms both to immediately mitigate the spread of COVID-19 behind bars, and to address the underlying and longstanding public health concerns associated with prisons and jails, which make mass incarceration itself a public health crisis. In particular, prosecutors should simultaneously reduce incarcerated populations and promote reforms that facilitate enhanced public health measures in correctional facilities. These reforms should not be temporary stopgaps to address the current pandemic, but rather long-term strategies to meaningfully address systemic problems in the criminal justice system.

An elected prosecutor's duty to promote the safety, rights, and well-being of the community necessarily extends to promoting humane and constitutional conditions of confinement.¹¹ As such, DAs have a key role to play in using their "bully pulpit" to urge access to necessary healthcare and hygiene measures to mitigate the risk of infection, serious illness, and death. And as prosecutors take steps to protect the health of people behind bars amid the COVID-19 pandemic, they must also preserve the constitutional rights of incarcerated individuals and individuals in contact with the justice system.

RECOMMENDATIONS FOR PROSECUTORIAL ENGAGEMENT AND ACTION

The following recommendations outline promising practices and needed reforms elected prosecutors should adopt to promote the health and rights of people who remain in custody. While the COVID-19 pandemic has brought the need for these practices into sharper focus, they should remain in effect beyond the pandemic. These recommendations rely upon collaborative leadership and partnership among criminal justice system stakeholders, elected leaders, and government officials, including elected prosecutors.

There is notable support for these concrete steps: in a joint statement, over 30 elected prosecutors attested to the importance of ensuring humane conditions of confinement and preserving the

⁹ Widra, E. and Wagner, P. (2020), *While jails drastically cut populations, state prisons have released almost no one*, Prison Policy Initiative, <https://www.prisonpolicy.org/blog/2020/05/14/jails-vs-prison-update/>.

¹⁰ Initial data, as of late June, suggested that "some jurisdictions...have returned to their pre-pandemic policing practices (which leads to an increase in arrests and jail bookings)." See Widra, E. and Hayre, D. (2020), *Failing Grades: States' Responses to COVID-19 in Jails & Prisons*, Prison Policy Initiative, https://www.prisonpolicy.org/reports/failing_grades.html.

¹¹ Elected prosecutors have recognized that they have a responsibility to see, acknowledge, and address conditions behind bars "to more fully [understand] what incarceration looks like in our communities." Fair and Just Prosecution (2020), *Building Empathy Through Experience: Elected Prosecutors' Pledge to Facilitate Officewide Prison, Jail and Juvenile Facility Visits*, 2, <https://fairandjustprosecution.org/wp-content/uploads/2019/11/Building-Empathy-through-Experience-Visit-a-Prison-Pledge-FINAL-11.20.19.pdf>.

rights of people who are incarcerated amid COVID-19.¹² While many prosecutors have adopted reforms that advance these goals, these concepts are fundamental and should be in place nationwide. All of these reforms are also predicated on the urgent starting point that DAs should work to ensure as few people as possible are behind bars.

I. Ensure Humane Conditions of Confinement

While prosecutors do not exercise direct control over the conditions in correctional facilities, they are leading voices on public safety who often work closely with correctional leaders and other key policymakers in their communities. DAs should use their position as justice system leaders to urge correctional facilities, public health officials, lawmakers, and other relevant stakeholders to adopt the approaches outlined below.

A. Advocate for Humane Housing Conditions

Prosecutors should urge facilities to work towards population reductions such that **single-occupancy bunking** is possible. Some DAs have already endeavored to shrink jail populations to facilitate social distancing. For example, **Milwaukee County (WI) District Attorney John Chisholm**¹³ has worked with the public defender, sheriff, head of the local correction facility and the state Department of Corrections to reduce jail occupancy to ensure private cells, while **6th Prosecutorial District (ME) District Attorney Natasha Irving**¹⁴ has worked with sheriffs and the state judiciary to achieve a jail population below 50 percent capacity. Furthermore, prosecutors should urge facilities to implement single-cell occupancy bunking and refrain from crowding incarcerated individuals into high-density housing areas.

Prosecutors should urge wardens and correctional officers to adopt humane health care and confinement policies for those behind bars, including:

- Implement a transparent and humane plan for housing people who are sick;
- Keep incarcerated individuals apprised of key information about the spread of the outbreak and policies being adopted to contain and mitigate the spread;
- Ensure that medical care is provided in a hospital, not in a correctional facility;¹⁵
- Prohibit the use of solitary confinement as a substitute for treatment of people

¹² 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>.

¹³ 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/>.

¹⁴ Email from 6th Prosecutorial District (Wiscasset, ME) District Attorney Natasha Irving (May 2020).

¹⁵ Aleaziz, H. (2020), *An ICE Detainee Who Was Released After Getting The Coronavirus Fears What's Next: "This Has Hit My Whole Body"*, BuzzFeed News, <https://www.buzzfeednews.com/article/hamedaleaziz/ice-detainee-coronavirus-released-fears>.

"You can't tell us to social distance and throw six men in a 15-by-15-foot cubicle.... They won't let us outside. People are sick, coughing, not able to breathe, and we are piled on top of each other.... I'm mad; I'm terrified."

— PERSON WHO IS INCARCERATED AT OAKDALE PRISON

exhibiting symptoms;¹⁶ and

- Prohibit solitary confinement and widespread facility-wide lockdowns as containment measures. Solitary confinement does not prevent interaction with correctional officers, and can, counterintuitively, necessitate increased staff and physical contact.¹⁷ Moreover, these harsh responses can exacerbate anxiety, provoke riots¹⁸ and hunger strikes,¹⁹ and implicate Eighth Amendment concerns.²⁰

Many facilities have used lockdowns to attempt to contain the spread of the virus,²¹ although lockdowns are ineffective and unacceptable containment measures. Some stakeholders are spearheading more appropriate and proactive responses. For example, **Bexar County (TX) Sheriff Javier Salazar** released a COVID-19 response plan²² before there were confirmed COVID-19 cases in the county's detention facility, which included a plan for medical isolation areas for sick individuals, distributing information about the virus to incarcerated individuals and staff, and cell decontamination. Prosecutors around the country should encourage those overseeing their local detention facilities to implement similar proactive measures that can help mitigate the spread of the virus behind bars and safely treat those who become sick.

B. Encourage Facilities to Provide Free Sanitation Products to Those in Custody and Conduct Comprehensive and Regular Cleaning of Facilities

Elected prosecutors should urge correctional facilities to provide free soap²³ and CDC-recommended hand sanitizer, gloves, and protective face masks to individuals in custody, and to implement more frequent and comprehensive sanitation and cleaning of facilities. Furthermore, prosecutors should urge correctional facilities to adopt rigorous screening

¹⁶ See, e.g., Unlock the Box (2020), *Solitary is Never the Answer*, 4, <https://static1.squarespace.com/static/5a9446a89d5abbfa67013da7/t/5ee7c4f1860e0d57d0ce8195/1592247570889/June2020Report.pdf> (finding that “virus-related lockdowns had increased the prison population held in some form of solitary from approximately 60,000 to well over 300,000 in a matter of weeks”).

¹⁷ Dr. Venters, H. (2020), *Coronavirus Behind Bars: 4 Priorities to Save the Lives of Prisoners*, The Hill, <https://thehill.com/opinion/criminal-justice/488802-coronavirus-behind-bars-4-priorities-to-save-the-lives-of-prisoners> (“Outbreaks often stir a desire to lock people away in cells, with the notion that germs won’t spread if people are sealed in individual cells. Nothing could be farther from the truth. Lockdown units often require more staff than regular units, because of the need to handcuff and physically escort people to and from the shower, in and out of the cell for health care, and numerous other basic operations. All of this means more staff and more physical contact.”); Ahalt, C. (2020), *The Pandemic Exposes the Shared Fates of the Jailed and the Jailer*, The Appeal, <https://theappeal.org/the-pandemic-exposes-the-shared-fates-of-the-jailed-and-the-jailer/>.

¹⁸ Nadeau, B.L. (2020), *Italy Prison in Flames in Coronavirus Lockdown Riot Among Cut-Off Inmates*, Daily Beast, <https://www.thedailybeast.com/six-inmates-dead-scores-escape-as-prisoners-riot-across-italy-after-visitor-restrictions-over-coronavirus>.

¹⁹ Atmonavage, J. (2020), *ICE detainees go on hunger strike in N.J amid coronavirus fears, lawyers say*, NJ.com, <https://www.nj.com/coronavirus/2020/03/we-would-rather-die-on-the-outside-than-in-here-ice-detainees-go-on-hunger-strike-in-nj-amid-coronavirus-fears-lawyers-say.html>.

²⁰ Solitary Watch (2011), *Fact Sheet: Solitary Confinement and the Law*, 1, <https://solitarywatch.org/wp-content/uploads/2011/06/fact-sheet-solitary-confinement-and-the-law.pdf>.

²¹ Blakinger (2020), *What Happens When More Than 300,000 Prisoners Are Locked Down?*, The Marshall Project, <https://www.themarshallproject.org/2020/04/15/what-happens-when-more-than-300-000-prisoners-are-locked-down>.

²² Friedman, C. (2020), *Bexar County Sheriff announces COVID-19 prevention plan for jail inmates, deputies*, KSAT, <https://www.ksat.com/news/local/2020/03/15/bexar-county-sheriff-announces-covid-19-prevention-plan-for-jail-inmates-deputies/>.

²³ Jenkins, J. (2020), *Prisons And Jails Change Policies To Address Coronavirus Threat Behind Bars*, NPR, <https://www.npr.org/2020/03/23/818581064/prisons-and-jails-change-policies-to-address-coronavirus-threat-behind-bars>.

procedures to test those entering and those admitted to facilities. Facilities should also adopt procedures to ensure staff who have been exposed to or contracted the virus, regardless of whether they are symptomatic, self-quarantine at home to prevent further spread and do not return to work until they test negative for the virus.²⁴

C. Urge Facilities to Make Quality Health Care Accessible for Those in Custody

In most states, incarcerated people are expected to make relatively steep co-pays for most health care services, which can discourage medical treatment. DAs should encourage their state to **suspend all co-pays** for incarcerated people in response to the pandemic. Ideally, given prevailing uncertainties about how the virus manifests and public health exigencies, suspension of co-pays should apply regardless of whether people are exhibiting symptoms that are known to be related to COVID-19.

As of July 2020, **11 states** have suspended all co-pays for incarcerated individuals in response to the pandemic, while **26 states** have suspended all co-pays for respiratory, flu-like or COVID-19 symptoms (11 states and the District of Columbia already did not charge co-pays).²⁵ Prosecutors have also advocated for these changes: in letters to their respective governors, **Kauai County (HI) Prosecuting Attorney Justin Kollar**²⁶ and **Baltimore City (MD) State's Attorney Marilyn Mosby**²⁷ sought the suspension of co-pays for medical visits for those behind bars with COVID-19 symptoms.

Moreover, given the scope of outbreaks in prisons and jails across the country, prosecutors should urge correctional facilities to **regularly test every incarcerated person and**

²⁴ To be sure, some state corrections officials have taken preliminary steps to enhance sanitation and access to hygiene practices behind bars – but more comprehensive sanitation procedures and processes are direly needed. The Wyoming Department of Corrections has instituted COVID-19 screenings for staff, including temperature checks; the Washington Department of Corrections has adopted contact tracing in correctional facilities; and litigation has resulted in the distribution of free soap in correctional facilities, including in Arizona, California, Pennsylvania and Miami, Florida. Wyofile (2020), *Warden credits 'hard work' as Wyoming DOC continues to report no cases*, KPVI 6, <https://www.newsbreak.com/news/1573459424550/warden-credits-hard-work-as-wyoming-doc-continues-to-report-no-cases>; The Associated Press (2020), *Dozen inmates test positive for coronavirus at prison in Eastern Washington*, <https://www.seattletimes.com/seattle-news/health/dozen-inmates-test-positive-for-coronavirus-at-prison-in-eastern-washington/>; Castle, L. (2020), *Free soap and health care: Arizona prisons announce plans to prevent coronavirus*, AZ Central, <https://www.azcentral.com/story/news/local/arizona-health/2020/03/20/free-soap-and-health-care-arizona-prisons-share-coronavirus-plan/2876415001/>; Wolfe (2020), *Oakland County Jail Ordered to Identify Prisoners Who Should be Released to Protect Them From COVID-19*, The Appeal, <https://theappeal.org/oakland-county-jail-ordered-to-identify-prisoners-who-should-be-released-to-protect-them-from-covid-19/>; Ovalle, D. (2020), *Judge orders Miami jail to give inmates soap, ensure social distancing to curb coronavirus*, Miami Herald, <https://www.miamiherald.com/news/local/community/miami-dade/article241842286.html>.

²⁵ Prison Policy Initiative (2020), *Responses to the COVID-19 pandemic*, <https://www.prisonpolicy.org/virus/virusresponse.html>.

²⁶ The Appeal (2020), Twitter, <https://twitter.com/theappeal/status/1242635301891145728>.

²⁷ 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>.

“People who are being held in detention are already a vulnerable population; they are frequently indigent and experience physical and mental ailments at higher rates than the general public. It is critical to their health and the health of facility employees that we take these steps.”

correctional facility employee for COVID-19 at no cost to the individuals tested. Critically, testing should not be limited to incarcerated individuals and staff who are symptomatic. This data should be made publicly available and updated regularly.

D. Urge Facilities to Provide Information About COVID-19 and Mitigation Strategies to Those in Custody and the Broader Community

Elected prosecutors should encourage correctional facilities to provide a continual flow of information and educational materials about the virus to individuals in custody and correctional staff, with a focus on measures they can take to minimize their risk of contracting and spreading the virus. Prosecutors should also encourage correctional facilities to communicate regularly and openly with the loved ones of those incarcerated and the community at large about conditions inside the facility and adopted mitigation measures.

For example, **Milwaukee County (WI) District Attorney John Chisholm** and other Milwaukee County officials released a dashboard detailing the county's response to COVID-19 in the criminal justice system, with up-to-date data on cases, containment strategy, and information about how people who continue to be incarcerated can stay safe and healthy.²⁸ State departments of corrections across the country have released dashboards with varying levels of detail: some, like **California**,²⁹ include detailed and accessible data and regular updates about facility strategy and actions, while others, like **Arkansas**, are more limited in scope.³⁰ Facilities should follow the example of the former.

II. Preserve Constitutional Rights and Uphold Due Process

A. Maintain Access to Counsel and Safeguard Familial Connections

Particularly in this moment of crisis and uncertainty, it is essential that incarcerated individuals have access, through phone and video calls, to their loved ones. It is also critical to ensure that incarcerated individuals' constitutional rights are protected through contact with legal counsel.

However, facilities largely eliminated in-person visitation in response to the COVID-19 pandemic,³¹ cutting off incarcerated individuals from vital contact with family and friends, as well as legal counsel. Five months into the pandemic, most states continued to restrict

²⁸ Milwaukee County (2020), *COVID-19 Dashboard for Individuals in County Care*, <https://county.milwaukee.gov/EN/COVID-19/Individuals-in-County-Care>.

²⁹ California Department of Corrections and Rehabilitation (2020), *COVID-19 Preparedness*, <https://www.cdcr.ca.gov/covid19/>.

³⁰ Arkansas Department of Correction (2020), *Coronavirus (COVID-19) Updates*, <https://adc.arkansas.gov/coronavirus-covid-19-updates>.

³¹ The Marshall Project (2020), *Coronavirus Tracker: How Justice Systems Are Responding in Each State*, <https://www.themarshallproject.org/2020/03/17/tracking-prisons-response-to-coronavirus>.

“Every day I wake up thinking about him. Was he able to wash his hands, are there any other inmates in there that are starting to have symptoms? Every time he calls I wonder is this the last time I’ll actually be speaking to my dad?”

— FAMILY MEMBER OF PERSON IN ICE DETENTION IN CALIFORNIA

visitation – and in particular, non-legal visitation remained suspended in all but eight states.³² Although communal phones in custodial facilities are used by many people each day, there have been reports that phones are not disinfected between each use amid the COVID-19 pandemic, thereby further inhibiting the ability of those behind bars to maintain connections.³³

Some correctional facilities are providing **free video and phone calls**, although these practices are very limited.³⁴ In April, the Federal Bureau of Prisons began providing free phone and video calls to individuals incarcerated in federal prisons.³⁵ However, recent reports allege that extended lockdowns have hindered access to phones.³⁶

At the local level in California, the San Francisco Board of Supervisors unanimously voted to stop charging those held in county jail for phone calls,³⁷ and in Tennessee, Shelby County waived fees for phone and video calls for those incarcerated in the county's correctional facilities.³⁸ Other jurisdictions and states have provided for more limited calls: the Utah Department of Corrections, for instance, is providing incarcerated individuals ten free 15-minute phone calls per week,³⁹ while the Delaware Department of Corrections temporarily provided incarcerated individuals two free 5-minute phone calls per week.⁴⁰

Elected DAs should encourage facilities and states to make phone calls free and **increase teleconferencing and videoconferencing capacity** to help people stay connected to family and counsel. For example, **Suffolk County (MA) District Attorney Rachael Rollins** is working with the defense bar to make sure they have “appropriate and meaningful” access to clients, and with defense counsel and community members to ensure families remain in contact with loved ones.⁴¹ Similarly, **Kauai County (HI) Prosecuting Attorney Justin Kollar** urged Hawaii Governor David Ige to distribute basic cell phones to those quarantined behind bars and

³² As of August 4th, some visitation has resumed. In 18 states, all visitation remains suspended; in 26 states, normal visitation remains suspended but legal visits are permitted; in 8 states, visitation has resumed with safeguards. The Marshall Project (2020), *How Prisons in Each State Are Restricting Visits Due to Coronavirus*, <https://www.themarshallproject.org/2020/03/17/tracking-prisons-response-to-coronavirus>.

³³ Jackson, A. (2020), *Prisoners sue Michigan Department of Corrections over coronavirus response*, Detroit Free Press, <https://www.freep.com/story/news/local/michigan/2020/04/30/michigan-department-of-corrections-class-action-lawsuit-coronavirus-in-prisons/3047921001/>.

³⁴ Brennan Center for Justice (2020), *Reducing Jail and Prison Populations During the Covid-19 Pandemic*, <https://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic>.

³⁵ Barr, L. (2020), *Bureau of Prisons allowing inmates to make free phone calls amid COVID-19 pandemic*, ABC News, <https://abcnews.go.com/US/bureau-prisons-allowing-inmates-make-free-phone-calls/story?id=70161178>.

³⁶ See, e.g., Wilson, C. (2020), *Federal Lawsuit Calls Out COVID-19 Conditions At Sheridan Prison*, OPB, <https://www.opb.org/news/article/lawsuit-treatment-inmates-federal-prison-covid-sheridan-oregon/>.

³⁷ Green, M. (2020), *San Francisco Permanently Scraps Jail Phone Call Fees*, KQED, <https://www.kqed.org/news/11828999/san-francisco-moves-to-permanently-scrap-phone-call-fees-product-markups-at-county-jails>.

³⁸ WMC Action News 5 (2020), *Shelby County cancels non-essential government meetings, jail visitations*, <https://www.wmcactionnews5.com/2020/03/13/shelby-county-cancels-non-essential-government-meetings-jail-visitations/>.

³⁹ Prison Policy Initiative (*Responses to the COVID-19 pandemic*), *supra* note 25.

⁴⁰ Gamard, S. (2020), *Inmates at Delaware correctional facilities get two free phone calls a week amid coronavirus*, Delaware Online, <https://www.delawareonline.com/story/news/2020/03/16/delaware-prisons-allowing-free-phone-calls-after-suspending-visitation/5059032002/>.

⁴¹ Algarin, R. (2020), *District Attorney Rollins Proposes Immediate Steps Amid Rising Health Concerns*, Suffolk County District Attorney, <https://www.suffolkdistrictattorney.com/press-releases/items/2020/3/12/district-attorney-rollins-proposes-immediate-steps-amid-rising-health-concerns>.

potentially all those currently incarcerated.⁴² More prosecutors should follow suit.

B. Preserve the Constitutional Rights of Those in Contact with the Criminal Justice System

On the front end, elected prosecutors should work to avoid unnecessary contact with the criminal legal system amid the current pandemic. To that end, elected prosecutors should avoid incarceration and detention unless there is an imminent public safety risk. DAs should use their discretion to refrain from prosecuting low-level cases and dismiss pending charges in cases that need not be in the justice system.⁴³ Moreover, they should work to identify cases that qualify for early plea deals, and consider time served in plea negotiations. As the pandemic continues, elected prosecutors should decline to call individuals who are not currently detained into courtrooms for routine non-emergency hearings, unless these individuals wish to be present at the hearing. Doing so unnecessarily presents public health risks for defendants, attorneys, and court personnel.

Elected prosecutors must also work with defense attorneys and court personnel to uphold defendants' constitutional rights, including the right to *Brady* disclosures and discovery, even amid containment measures and courtroom closures. For instance, prosecutors should not delay the speed at which discovery is provided to defense counsel and should make every effort to facilitate digital transmission of discovery.

The rampant and devastating spread of COVID-19 behind bars raises concerns about potentially coercive plea bargains. Observers have alleged prosecutors have coerced guilty pleas using the threat of detention and associated risk of contracting COVID-19 behind bars.⁴⁴ This is a particularly acute concern in jurisdictions where jury trials are on hold for the near future, and therefore are not viable options for individuals to pursue as alternatives to pleading guilty.⁴⁵ As the pandemic persists and worsens in correctional settings, so too does the risk that people may plead guilty and accept home confinement or time served to avoid detention amid the COVID-19 pandemic – regardless of their innocence or guilt. Prosecutors should take caution to ensure that risk of exposure to COVID-19 behind bars does not become “another

⁴² The Appeal (Twitter), *supra* note 26.

⁴³ For more on recommended practices for prosecutors in reducing mass incarceration amid the current pandemic, see Fair and Just Prosecution, *supra* note 2.

⁴⁴ Johnson, T. (2020), *Crisis and Coercive Pleas*, *Journal of Criminal Law and Criminology Online*, 2, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3632052.

⁴⁵ Maher, T. (2020), *Plea Bargaining in the Shadow of COVID-19*, Duke Law Center for Science and Justice Blog, <https://sites.law.duke.edu/csj-blog/2020/05/19/plea-bargaining-in-the-shadow-of-covid-19/>.

“It’s forcing courts, sheriffs, and District Attorney offices across the country to take a long, hard look in the mirror and identify what our core function is. How can we contribute to public safety, and how do we actually undermine it? We should not have people in prisons and jails who aren’t a violent threat. We should not expose sheriff’s deputies and guards and court staff to contagious diseases as part of their work. Those changes are long overdue and need to be implemented both now and after this crisis passes.”

bargaining chip in the plea negotiation” process.⁴⁶ Furthermore, prosecutors should not require that individuals waive rights, such as the right to seek compassionate release, the right to appeal, or the right to pursue a sentencing reduction, in order to plead guilty.

In jurisdictions where trials are resuming in person, due process and public health concerns abound. Most fundamentally, courtroom proceedings heighten risk of exposure to COVID-19 for individuals who are charged, counsel, and court personnel. Furthermore, in-person jury trials may unduly limit the pool of available jurors, due to the risk of COVID-19 transmission; this may also prompt stakeholders to move more rapidly through trials and risk abridging constitutional rights.⁴⁷ Additionally, face masks may inhibit access to important facial cues of a juror, judge, or the person charged.⁴⁸ The pandemic also poses obstacles to thorough investigation and adjudication; for example, witnesses may be more difficult to reach, or access to crime scenes may be limited by the restriction of travel in certain jurisdictions.⁴⁹

C. Addressing Concerns Associated with Remote Proceedings

Rather than hold in-person proceedings and assume the associated risk of infection, jurisdictions are increasingly moving towards remote proceedings. Remote proceedings are possible because, although people are entitled to be present at critical proceedings of a criminal prosecution against them, they can waive the right to be present in person in court and opt for remote proceedings. Fundamentally, caution must be taken by prosecutors, defense counsel, and judges to ensure that any waiver decision is informed and not pressured.

Concerningly, previous scholarship has found that remote proceedings can erode due process and produce disparate outcomes.⁵⁰ While prior research is limited, a study of a decade of video bail determination hearings in Cook County, Illinois, found that video teleproceedings resulted in bail being set higher or not being offered, compared to in-person proceedings: on average, video proceedings saw a 51% increase in the amount of bail set.⁵¹ Similarly, in the immigration court context, a study found that asylum applicants who appeared in person were granted asylum at statistically significantly higher rates than those who appeared virtually, controlling for the presence of legal representation.⁵² Further, studies have found that remote

⁴⁶ Johnson, *supra* note 44 at 3.

⁴⁷ *Id.* at 3-5.

⁴⁸ Masks can also, however, have an equalizing effect. See Simon-Kerr, J.A. (2020), *Unmasking Demeanor*, George Washington Law Review, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3610460.

⁴⁹ Johnson, *supra* note 44 at 8.

⁵⁰ Remote proceedings can also have benefits for the administration of justice, as they can increase access to interpreters and can potentially reduce the amount of time defendants are detained pretrial.

⁵¹ Diamond, S.S., Bowman, L., Wong, M., and Patton, M. (2010), *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, *The Journal of Law and Criminology*, 892, 898, <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7365&context=jclc>. The study concluded that “defendants were significantly disadvantaged by the video-conferenced bail proceedings,” noting that this change “cannot be attributed to general trends or seasonal variations.”

⁵² Walsh, F. and Walsh, E. (2008), *Effective Processing or Assembly Line Justice? The Use of Teleconference in Asylum Removal Hearings*, *Geo. Immigration Law Journal*, 271, <https://heinonline.org/HOL/LandingPage?handle=hein.journals/geoimlj22&div=18&id=&page=>.

proceedings hamper individuals' ability to confer and communicate with counsel effectively⁵³ and can dehumanize them.⁵⁴

Moreover, social science research suggests virtual, compared with in-person, communication can hamper critical cues and distort impressions. Some studies have found that jurors find witnesses less credible when they are remote.⁵⁵ Others found that nonverbal cues, both in the courtroom and in other contexts, convey important information to participants and play a meaningful role in the adjudication process;⁵⁶ however, such cues are eliminated in remote proceedings.

Because of the public health risks of in-person proceedings and the due process risks of remote proceedings, elected prosecutors should default to delaying prosecution, dismissing charges, and declining to call individuals who are not currently detained into courtrooms for routine, non-emergency hearings. For individuals who are detained, prosecutors should seek **expanded pretrial release** and decline to request pretrial detention barring exigent circumstances.⁵⁷

In jurisdictions where trials and hearings are resuming virtually due to public health risks, courts, prosecutors, and defense counsel must adopt safeguards to protect individuals' constitutional rights and uphold due process. Some prosecutors have proposed adopting safeguards to balance public health and the administration of in-person justice, such as separating and socially distancing grand jurors into distinct rooms connected via video conference, in the same courthouse building, to allow for real-time deliberation and examination of evidence.⁵⁸ More prosecutors should propose creative safeguards such as these to protect defendants' rights amid remote proceedings.

⁵³ Byrom, N. (2020). *What we know about the impact of remote hearings on access to justice: a rapid evidence review*, Nuffield Family Justice Observatory/The Legal Education Foundation, 3, https://www.nuffieldfjo.org.uk/app/nuffield/files-module/local/documents/nfjo_remote_hearings_vulnerable%20groups_rapid%20review_20200506.pdf; Cimino, E.F., Makar, Z., and Novak, N. (2014), *Charm City Televised & Dehumanized: How CCTV Bail Reviews Violate Due Process*, University of Baltimore Law Forum, <https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=2453&context=lf>; Hillman, Z. (2007), *Pleading Guilty and Video Teleconference: Is a Defendant Constitutionally "Present" When Pleading Guilty by Video Teleconference?*, High Technology Law, 64, https://cpb-us-e1.wpmucdn.com/sites.suffolk.edu/dist/5/1153/files/2018/02/hillman_note-11lcaxj.pdf ("Furthermore, even if the defendant and counsel advocate, a lawyer zealously can speak over a private line, counsel will suffer from the same problems that a judge may encounter when video teleconference is used, i.e., the inability to detect non[verbal [sic] cues and the problems caused by the camera-video setup. . . . [E]ven if privileged communications can be provided, the relationship and conversation between attorney and defendant may be chilled. This will contribute to a lower threshold of advice and communication which weighs unfairly against the defendant.").

⁵⁴ Cimino, *supra* note 53 at 71-74.

⁵⁵ Orcutt, H. et al. (2001), *Detecting Deception in Children's Testimony: Factfinders' Ability to Reach the Truth in Open Court and Closed-Circuit Trials*, Law and Human Behavior, 199, <https://link.springer.com/article/10.1023/A%3A1010603618330>; Goodman, S. et. al. (1998), *Face-to-Face Confrontation: Effects of Closed Circuit Technology on Children's Eyewitness Testimony*, Law and Human Behavior, <https://link.springer.com/article/10.1023/A:1025742119977>.

⁵⁶ Hillman, *supra* note 53.

⁵⁷ Furthermore, the alternative of avoiding remote proceedings poses risks to the administration of justice and defendants' constitutional rights. Declining to pursue remote proceedings threatens to unduly lengthen detention, as jurisdictions pause speedy trial clocks for individuals held pretrial amid the pandemic. Further and continued research is needed to safeguard defendants' constitutional rights as the criminal legal system charts a path forward.

⁵⁸ Email from Suffolk County District Attorney Rachael Rollins, April 2020.

Prosecutors should urge courts and legislators to **protect the confidentiality** of email, telephone, and video communication between incarcerated people and counsel. Amid remote proceedings and limits or lack of access to in-person communication with counsel, this should include ending the Bureau of Prisons policy that requires incarcerated people to waive attorney-client privilege when emailing counsel.⁵⁹ The Effective Assistance of Counsel in the Digital Era Act, currently pending in the Senate, would achieve this end.⁶⁰ Furthermore, state-level investigations have documented phone calls with attorneys being recorded and improperly sent to prosecutors; prosecutors should affirm defendants' right to attorney-client privilege and condemn such practices.⁶¹ Additionally, private spaces should be made available in correctional facilities for confidential video and telephone communication between defendants and counsel, and for defendants to use during any remote proceedings.⁶²

Similarly, people must be provided time for **privileged discussion with counsel** before, during, and after court proceedings.⁶³ Such space should be out of view from other court participants, and allow real-time, immediate communication. To that end, defendants and defense counsel should be allowed to stop court proceedings to allow for private discussion, even if that needs to occur through a separate virtual connection.

Defendants should not be charged additional **costs for remote appearances**.⁶⁴ The cost of virtual proceedings, which depend upon access to high quality internet, should not be passed on to defendants. Rather, courts should make video and internet capabilities available to those who do not have access to such technology, at no cost to defendants.⁶⁵

Safeguards must be adopted to **mitigate issues associated with technology**. When technology malfunctions, proceedings should be paused until the issue has been resolved; to that end, courts should make technological support available to defendants, both those detained and not detained, during proceedings.⁶⁶ Further, virtual proceedings must be set up to allow people to see all participants in the virtual courtroom.⁶⁷ Alarming, a lack of access by family members to remote proceedings is subject to ongoing litigation; courts must make proceedings available to family members while balancing privacy concerns associated with online access to hearings.⁶⁸ Courts must also prohibit recording of remote proceedings

⁵⁹ Crump, C. and White, K. (2020), *Op-Ed: Lawyers can't visit clients in prison, so quit monitoring their emails*, Los Angeles Times, <https://www.latimes.com/opinion/story/2020-06-22/lawyers-incarcerated-prisons-email-monitor>.

⁶⁰ *Id.*

⁶¹ See, e.g., Hogan, S. (2020), *Recording of 837 attorney-client phone calls 'borders on the ridiculous'*, Bangor Daily News, <https://bangordailynews.com/2020/07/11/news/recording-of-837-attorney-client-phone-calls-in-4-county-jails-borders-on-the-ridiculous/>; Cover, S. (2020), *Protected attorney-client calls released to prosecutors at least four times in Maine*, The Maine Monitor, <https://www.themainemonitor.org/protected-attorney-client-calls-released-to-prosecutors-at-least-four-times-in-maine/>.

⁶² Fair Trials (2020), *Safeguarding the Right to a Fair Trial During the Coronavirus Pandemic: Remote Criminal Justice Proceedings*, 5, <https://www.fairtrials.org/sites/default/files/Safeguarding%20the%20right%20to%20a%20fair%20trial%20during%20the%20coronavirus%20pandemic%20remote%20criminal%20justice%20proceedings.pdf>.

⁶³ *Id.*

⁶⁴ National Association for Public Defense (2020), *Statement on the Issues With the Use of Virtual Court Technology*, 2, <https://idc.utah.gov/wp-content/uploads/2020/06/NAPD-Virtual-Court-Statement-8.0.pdf>.

⁶⁵ *Id.*

⁶⁶ Fair Trials, *supra* note 62 at 6.

⁶⁷ *Id.*

⁶⁸ Complaint, *ACLU et. al. v. Tamarah Harber-Pickens et. al.* (2020), https://www.aclusocal.org/sites/default/files/aclu_socal_v_harber-pickens_20200626_complaint.pdf.

absent consent by all; and if a record is expunged or sealed, any recording of an associated proceeding must be erased.⁶⁹

Courts and correctional facilities must provide help to individuals who are incarcerated to appear professional and shield their detention status in court proceedings. Prosecutors should urge courts to provide incarcerated individuals professional clothing for proceedings, and to allow them to use virtual backdrops that do not indicate that they are incarcerated.⁷⁰

Because remote proceedings pose significant due process concerns, prosecutors, defense attorneys, and courts should **collect data** on remote adjudication.⁷¹ This should include collecting information on disparities in outcomes between remote and in-person proceedings, disaggregated by race, gender, ethnicity, and disability status. This data should be made publicly available. Furthermore, courts should monitor and make publicly available data on the effectiveness of – and issues with – remote conferencing technology.⁷²

These recommendations provide initial safeguards that prior research and advocacy suggest courts should adopt in moving to remote proceedings. However, additional and continued research is needed to ensure courts, prosecutors, and defense counsel do not erode constitutional rights in remote proceedings. These recommendations are intended as a starting point for justice system stakeholders in working to develop robust plans to protect rights and the administration of justice against the backdrop of COVID-19.

SUMMARY OF RECOMMENDATIONS

I. Ensure Humane Conditions of Confinement

A. Advocate for Humane Housing Practices

- Reduce incarcerated populations to allow for **single-cell occupancy**; urge state and local correctional leaders to adopt single-cell occupancy to the extent possible.
- Urge facilities and wardens to implement a **transparent and humane plan for housing people** who are not released but who are sick, and for keeping them apprised of key information.
- Ensure that those who need COVID-19 related medical care receive it in a **hospital**, not in a correctional facility.
- Make clear that **solitary confinement** cannot replace medical isolation of a person exhibiting symptoms, and that neither solitary confinement nor widespread facility-wide lockdowns are humane or effective virus containment measures.

B. Encourage Facilities to Provide Free Sanitation Products to Those in Custody and Conduct Comprehensive and Regular Cleaning of Facilities

- Encourage correctional facilities to provide **face masks, free soap** and CDC-recommended **hand sanitizer**, and to provide for more frequent and comprehensive **sanitation and cleaning** of facilities.

⁶⁹ National Association for Public Defense, *supra* note 64 at 10-12.

⁷⁰ Fair Trials, *supra* note 62 at 8.

⁷¹ *Id.*

⁷² *Id.*

- Urge correctional facilities to **adopt rigorous screening procedures** to test those entering and those admitted to facilities.
- Urge facilities to adopt procedures to ensure staff who have been exposed to or contracted the virus **self-quarantine at home and do not return to work until they have tested negative for the virus.**

C. Urge Facilities to Make Quality Health Care Accessible for Those in Custody

- Encourage the state to **suspend all co-pays** for incarcerated people in response to the pandemic.
- Urge correctional facilities to **regularly test every incarcerated person and correctional facility employee** for COVID-19 at no cost to the individuals tested.

D. Urge Facilities to Provide Information About COVID-19 and Mitigation Strategies to Those in Custody and the Broader Community

- Encourage correctional facilities to provide **educational materials** to individuals in custody and correctional staff about the virus and measures they can take to minimize their risk of contracting or spreading the virus.
- Encourage correctional facilities to **communicate regularly and openly** with the loved ones of those incarcerated and the community at large about the conditions inside the facility and mitigation measures.

II. Preserve Constitutional Rights and Uphold Due Process

A. Maintain Access to Counsel and Safeguard Familial Connections

- Encourage facilities and states to make **phone calls free** and **increase teleconferencing and video conferencing capacity** to help people stay connected to family and counsel.

B. Preserve Constitutional Rights of Those in Contact with the Criminal Justice System

- Because of the public health risks of in-person proceedings and the due process risks of remote proceedings, elected prosecutors should **default to delaying prosecution, dismissing charges, and declining to call individuals** who are not currently detained into courtrooms for routine, non-emergency hearings. For individuals who are detained, prosecutors should **seek expanded pretrial release.**
- Make clear to line prosecutors that risk of exposure to COVID-19 behind bars must **not be used as “another bargaining chip in the plea negotiation”** process.
- Do **not require that individuals waive rights**, such as the right to seek compassionate release, the right to appeal, or the right to pursue a sentencing reduction, **as part of a plea agreement.**

“An outbreak of COVID-19 behind bars risks overwhelming our already taxed medical providers, puts incarcerated individuals at fatal risk, and endangers correctional officers and staff The interplay between public health and public safety has never been more apparent.”

— BERKSHIRE COUNTY (MA) DISTRICT ATTORNEY ANDREA HARRINGTON

C. Addressing Concerns Associated with Remote Proceedings

- When remote proceedings are necessary to protect public health, encourage courts to adopt **safeguards to protect individuals' constitutional rights and mitigate biases potentially introduced by remote technology**.
- Protect **attorney-client confidentiality** by allowing for private, unrecorded conversations with counsel, providing private spaces for conferral, and allowing for confidential and private sidebars with counsel during proceedings.
- Avoid **passing costs** of remote proceedings onto individuals.
- Limit the impact of **technological issues** on proceedings.
- Protect people's right to **appear professionally** before the court.
- Collect and make publicly available **data** on disparities in remote adjudication as compared to in-person proceedings.

CONCLUSION

The urgent need for rapid decarceration to mitigate the spread of COVID-19 through jails and prisons across the country – and through the broader community – is abundantly clear. But substantial decarceration has not been widely achieved at the state level, and has stalled in some jurisdictions, meaning that many people remain incarcerated amid the worsening COVID-19 pandemic.

Elected prosecutors, whose duty is to protect the safety and well-being of all members of the community, have a key role to play in leading efforts to promote the safety and protect the rights of those behind bars. Prosecutors should use their position as justice system leaders to urge corrections facilities, wardens, and lawmakers to ensure incarcerated people have access to quality health care and can adopt hygiene and sanitation measures to mitigate risk of infection, serious illness, and death. They should also advocate for the adoption of safeguards to protect constitutional rights, in conjunction with defense counsel and court administrators, in remote proceedings. **Such actions, however, must be paired with and cannot be a substitute for ongoing substantial decarceration.**

Moreover, these changes should continue *beyond the pandemic*. Actions taken to mitigate the spread of COVID-19 through correctional facilities should yield reforms that address not only the immediate public health threat posed by COVID-19, but also the systemic public health crisis of mass incarceration itself. These reforms – from substantially reducing incarceration to improving health care in correctional facilities – are long overdue.

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