

SCPW-20-0000213

IN THE SUPREME COURT OF THE STATE OF HAWAII

**Electronically Filed
Supreme Court
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STATE OF HAWAII OFFICE OF THE
PUBLIC DEFENDER,

Petitioner,

vs.

DAVID Y. IGE, Governor, State of Hawai'i;
NOLAN P. ESPINDA, Director, State of
Hawai'i Department of Public Safety;
EDMUND (FRED) K.B. HYUN,
Chairperson, Hawai'i Paroling Authority;

Respondents,

ORIGINAL PROCEEDING

**[PROPOSED] BRIEF OF *AMICI CURIAE* ACLU OF HAWAII FOUNDATION AND
LAWYERS FOR EQUAL JUSTICE IN SUPPORT OF STATE OF HAWAII OFFICE
OF THE PUBLIC DEFENDER'S PETITION FOR EXTRAORDINARY WRIT
PURSUANT TO HRS §§ 602-4, 602-5(5), AND 602-5(6)
AND/OR FOR WRIT OF MANDAMUS**

**APPENDIX A: "NATIONWIDE COURT ACTIONS TO REDUCE INCARCERATION
IN LIGHT OF COVID-19"**

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I. INTRODUCTION

The American Civil Liberties Union of Hawai‘i Foundation (“ACLU of Hawai‘i”) and Lawyers for Equal Justice (“LEJ”) (together, “Nonprofit Amici”) respectfully submit this *amicus* brief in support of the State of Hawaii Office of the Public Defender’s petition for extraordinary writ (“Petition”).

II. ARGUMENT

Nonprofit Amici respectfully submit that, in light of the escalating COVID-19 pandemic, the Court should exercise its broad supervisory jurisdiction over the judicial system to appoint a special master with full authority to make prompt decisions to reduce the number of people detained or incarcerated in Hawai‘i correctional centers and correctional facilities. The special master should have full authority to supervise and manage the release process and should be empowered to decide all relevant issues, including: (1) the appropriate decarceration target that would meaningfully reduce the likelihood of a devastating COVID-19 outbreak¹; (2) the process for preliminarily identifying people to be released; (3) whether hearings are necessary for some of the people preliminarily identified for release, and if so, the procedures and timing of such hearings; (4) reasonable conditions of release; and (5) measures to ensure people are released expeditiously. The special master should also have the authority to arrange for and coordinate such social, economic, and medical resources as may be needed to support those who are released. Finally, the special master should regularly report to this Court the number of individuals released, whether the goal of social distancing in the correctional facilities is being achieved, and whether further orders from this court are necessary. Such an ongoing reporting

¹ Petitioner already appears to have proposed one such benchmark: reductions within jails and prisons to “their design capacity within 10 days.” Petition at 16, 19.

requirement is needed for the parties and the Court can determine whether the process is working and, if not, how it needs to change.

Nonprofit Amici also make five points regarding the Petition and the responses filed so far: (A) time is of the essence, (B) overcrowding amid a pandemic is unconstitutional, (C) the Petition seeks relief that many other state supreme courts have already granted, (D) a special master process ensures rapid but individualized review, and (E) imposing more blanket conditions of release would be unlawful and irrational.

A. The Present COVID-19 Pandemic Requires Immediate Action

There are essentially no disputed facts in this matter. The Petition sets forth a 13-page Statement of Facts, describing the highly infectious nature of COVID-19 and the fact that it spreads at an exponential rate, Petition at 1-5; the risks a pandemic poses in correctional facilities generally, and the emergency steps taken in other jurisdictions to mitigate those risks, *id.* at 5-8; and the especially high risk of a catastrophic outbreak in Hawaii's correctional facilities because of longstanding overcrowding, poor hygiene, and otherwise poor conditions, *id.* at 9-13.

Respondents do not challenge any of the Petition's demonstrations. Thus, the following facts are undisputed in this proceeding:

- “COVID-19 is highly infectious. Both symptomatic and asymptomatic people can spread COVID-19, and scientists estimate that the average infected person then spreads the disease to between two and four others.” *Id.* at 4.
- “During this pandemic, correctional facilities are at particularly high risk for the spread of COVID-19. ... [T]he ability of inmates to disinfect their own living area and to practice frequent hand hygiene may be affected by the fact that each inmate must purchase their own hygiene products.” *Id.* at 5-6.

- “Overcrowding and inefficient infrastructure create safety and security risks to staff, inmates and the public.” *Id.* at 8 (quoting Respondent Espinda from January 20, 2020).
- “The Department of Public Safety has repeatedly and candidly acknowledged the dangers and realities of overcrowded correctional facilities.” *Id.* at 10.
- “The most recent statistics confirm that Hawai‘i jails and prisons are overcrowded beyond capacity.” *Id.* at 11.

In addition, Respondents concede that “reducing the jail and prison population could potentially assist the state’s existing operational plan to address COVID-19 in correctional facilities.” Resp’t Answer at 2.² Respondents agree to “a Court-appointed special master to oversee releases.” *Id.* Respondents further agree that the special master would have the power to “make release decisions based on criteria agreed-upon by the parties and approved by this Court,” without requiring further judicial review. *Id.* at 6. Thus far, the parties agree.

Respondents’ plan, however, entirely lacks any sense of urgency or accountability. It proposes a consultation process just for the appointment of a special master, without any indication of when that process should start, much less finish. It sets no timetable for the discussion among the parties about release criteria, which all parties agree is the critical next step. The plan proposes no process or schedule for resolving disagreements about release criteria. Nor does the plan set even a nonbinding goal for the ultimate number of persons to be released. Indeed, beyond a “continued telephone conference ... scheduled for Thursday, April 1, 2020 at 11:00 a.m.,” *id.* at 7, Respondents do not commit to any schedule, deadline, or measurable goal.

² Amici appreciate that Respondents’ response does not indulge in some of the irresponsible rhetoric from high government officials found outside the judicial process. For example, at a press conference delivered on March 31, 2020, Honolulu Mayor Kirk Caldwell stated that prisons “could actually be the safest place in terms of COVID-19” and that released detainees “are going to do what they know how to do and that could be breaking in and entering again.”

The Court should supply the urgency and accountability that is so lacking in Respondents' response. The Court's appointment of a special master would do just that. Empowering a single decisionmaker who can oversee the parties' continuing negotiations and who can also ensure swift implementation of agreed-upon criteria would ensure that the parties are held accountable in urgently working towards a solution that minimizes the impact of the ongoing public health disaster.

B. Overcrowding Amid a Pandemic is Unconstitutional

Respondents acknowledge that the "COVID-19 emergency presents an extreme and unprecedented challenge to the people of Hawai'i" and that "[o]ur health care, corrections, law enforcement, and other societal institutions are strained in ways unimaginable." Resp't Answer at 2. Yet Respondents for the most part also ignore this new reality—that of an extreme public health emergency—in their discussion of the constitutional protections the Hawai'i and U.S. constitutions provide to people in jails and prisons. *Id.* at 7-11. Specifically, Respondents do not cite or attempt to distinguish seminal cases holding that "[c]onditions [of confinement] that pose an unreasonable risk of future harm violate the Eighth Amendment's prohibition against cruel and unusual punishment, even if that harm has not yet come to pass." Petition at 20 (citing, among other cases, *Helling v. McKinney*, 509 U.S. 25, 33 (1993) ("It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.") and *Gates v. Collier*, 501 F.2d 1291, 1300-1303 (5th Cir. 1974) (holding that inmates were entitled to relief under the Eighth Amendment when they proved threats to personal safety from the mingling of inmates with serious contagious diseases with other prison inmates)). Instead, Respondents maintain that overcrowding alone is insufficient to state claims under the Eighth and Fourteenth Amendments

and insist that, after decades of admitted overcrowding,³ Respondents in the past few weeks are now “taking reasonable steps to address the COVID-19 crisis.” Resp’t Answer at 9-10.

While overcrowding alone may not suffice to state a claim under the Eighth and Fourteenth Amendments, that is not necessarily the case under the Hawai‘i Constitution.⁴ And in any event, Petitioner does not claim overcrowding *alone*, as Respondents maintain, but rather overcrowding *during a pandemic* that poses a grave risk to life and bodily integrity for thousands of people in the State’s custody. Here, overcrowding is inexorably linked with the inability of individuals in custody to exercise social distancing, wash their hands frequently, wear masks, and take other necessary precautionary measures against the virus. Overcrowding also severely limits the Department of Public Safety’s ability to adequately protect people against harm. For example, people in many State facilities are double- or triple-bunked in cells designed to hold

³ See Petition at 8-14 (describing conditions of overcrowding in Hawai‘i jails and prisons).

⁴ Contrary to Respondents’ suggestions, this Court has *not* addressed whether article I, sections 5 and 12 of the Hawai‘i Constitution offer stronger protections against overcrowding during incarceration or detention than do the Eighth and Fourteenth Amendments to the U.S. Constitution. See Resp’t Answer at 8 (admitting “there is no controlling case law” under article I, section 12); *Gordon v. Maesaka-Hirata*, 143 Hawai‘i 335, 347, 431 P.3d 708, 720 n. 14 (2018) (explicitly refusing to reach due process claims under Hawai‘i Constitution where damages were sought under 42 U.S.C. § 1983). Indeed, “the Hawai‘i Supreme Court is free to give broader protection under the Hawai‘i Constitution than given by the United States Constitution,” and this Court may very well find that overcrowding *alone* violates either section 5 (for pretrial detainees), section 12 (for sentenced people), or both. *State v. Wilson*, 144 Hawai‘i 454, 465, 445 P.3d 35, 46 n.16 (2019) (cleaned up). Additionally, the Hawai‘i Constitution, unlike the federal constitution, explicitly recognizes a right to privacy, which includes a right to bodily autonomy and a right to make one’s own medical decisions. *State v. Kam*, 69 Haw. 483, 492, 748 P.2d 372, 378 (1988), *abrogated on other grounds by Tax Found. of Hawaii v. State*, 144 Hawai‘i 175, 439 P.3d 127 (2019) (article I, section 6 of the Hawai‘i Constitution “*gives each and every individual the right to control certain highly personal and intimate affairs of his own life. The right to personal autonomy, to dictate his lifestyle, to be oneself are included in this concept of privacy* Stand. Comm. Rep. No. 69, in 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 674–75 (1980) (emphasis added).”). Such privacy rights are being perpetually compromised “without the showing of a compelling state interest” by overcrowded conditions in Hawaii’s correctional facilities. Haw. Const. art. I, § 6; *see also* Petition at 8-14.

one person, making isolation during an outbreak effectively impossible. This overcrowding, which places people at an elevated risk of potentially lethal infection, constitutes “cruel and unusual punishment” under the Eighth Amendment and is also a violation of the Fourteenth Amendment. *See Hutto v. Finney*, 437 U.S. 678, 682 (1978); *Gates*, 501 F.2d at 1300-1303.

Except for the apparent reduction of the jail population between two arbitrary dates—which nonetheless left all facilities operating significantly above their design capacity—the actions taken by Respondents to address overcrowding to date consisted almost exclusively of suspending various rights and privileges for people in custody, *i.e.*, the suspension of visitation, parole hearings, furlough, and all non-essential programming. Resp’t Answer, Ex. D at 1-2. In line with this approach, Respondents’ plan for containment if someone gets sick or needs to be quarantined is some form of isolation, akin to solitary confinement,⁵ or, in large dorm room settings, “to attempt to place the beds of sick inmates at a distance of at least 6 feet from other inmates.” *See id.*, Ex. E at 10-12, Table 3. The “medical care” consists of giving the people with COVID-19 symptoms water mixed with sugar and salt, administering Tylenol or ibuprofen as needed for fever, and having check-ins for “signs and symptoms of shortness of breath or decompensation” at least twice a day until someone needs to be taken to the hospital with the person “remain[ing] at the sending facility until cleared by the Provider.” *Id.*, Ex. E at 10-11. Tellingly, absent from Respondents’ plans are commonsense steps such as supplying all inmates and staff with free soap, hand sanitizer, masks, access to warm water, and waiving medical fees. *Id.* In sum, Respondents’ approach so far has been to make already difficult overcrowding conditions even less tolerable. *Hutto*, 437 U.S. at 686-87 (“A filthy, overcrowded cell and a diet

⁵ Most worrying, the Department of Public Safety recommends people with disabilities (e.g., pregnant, diabetes, heart disease, and lung disease) should be indefinitely isolated in a single cell “[i]f feasible.” Resp’t Answer, Ex. E at 12.

of ‘grue’ might be tolerable for a few days and intolerably cruel for weeks or months.”).

Finally, Respondents did not respond *at all* to Petitioner’s arguments about the common and unconstitutional practice of using unaffordable cash bail to detain pretrial detainees or the due process rights implicated by the continuing detention and imprisonment of people in overcrowded conditions during a life-threatening pandemic. Petition at 22-23, n. 53. First, hundreds of people are in jail in Hawai‘i on bail they cannot afford and now they risk significant harm or loss of life, simply because they do not have enough money. Such wealth-based detention is plainly unconstitutional. *Id.* Second, the twin risks of loss of life or permanent injury were not considered during sentencing or bail setting. Thus, until life-threatening overcrowding is meaningfully addressed, the risk of life and permanent injury implicates significant substantive and procedural due process rights that this Court cannot and should not ignore.

C. The Relief Requested By The Petition Is Consistent With Relief Granted By Other State Judiciaries

Granting immediate relief to reduce the number of people incarceration in Hawai‘i jails and prisons is consistent with the actions taken by other courts in response to the COVID-19 pandemic.⁶ To date, at least eight state and local court systems have already taken steps to reduce incarceration levels. These steps include:

- **California:** Chief Justice Tani Cantil-Sakauye of the California Supreme Court has directed trial courts to “[l]ower bail amounts significantly” and “[i]dentify detainees with less than 60 days in custody to permit early release[.]”
- **Michigan:** Chief Justice Bridget McCormack of the Michigan Supreme Court has directed courts to take various steps to limit custodial arrests, increase pretrial release, and reduce and suspend jail sentences. “Following this advice,” Justice McCormack wrote, “WILL SAVE LIVES.”
- **Montana:** Chief Justice Mike McGrath of the Montana Supreme Court has urged judges to “review your jail rosters and release, without bond, as many prisoners as you are able,

⁶ See **Appendix A** (collecting nationwide court actions to reduce incarceration in light of COVID-19).

especially those being held for non-violent offenses.”

- **Ohio:** Chief Justice Maureen O’Connor has urged “judges to use their discretion and release people held in jail and incarcerated individuals who are in a high-risk category for being infected with the virus.”
- **South Carolina:** The South Carolina Supreme Court instructed that everyone held on bond in a non-capital case be released with certain exceptions.⁷

Courts within the Ninth Circuit have similarly recognized that the COVID-19 pandemic warrants immediate, extraordinary relief. *See, e.g., Xochihua-Jaimes v. Barr*, No. 18-71460, 2020 WL 1429877, at *1 (9th Cir. Mar. 24, 2020) (“In light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers, the court *sua sponte* orders that Petitioner be immediately released from detention”); *In re Extradition of Alejandro Toledo Manrique*, No. 19-71055, 2020 WL 1307109, at *1 (N.D. Cal. Mar. 19, 2020) (ordering the release of a 74-year old detainee and concluding “the government’s suggestion that [the plaintiff] should wait until there is a confirmed outbreak of COVID-19 in [the facility] before seeking release is impractical. By then it may be too late.”).

This Court should follow the humanitarian precedent set by the aforementioned jurisdictions and ensure similar relief for incarcerated people who are facing mortal peril due to the pandemic. In doing so, this Court can take comfort in knowing that it will not be acting alone.

D. A Special Master Can Conduct Swift But Individualized Review of Release Decisions

The parties appear to agree that the most efficient and effective way to reduce the number of people detained or incarcerated in the State’s jails and prisons while also maintaining public

⁷ Chief Justice Wayne Betty directed that “any person charged with a non-capital crime shall be ordered released pending trial on his own recognizance without surety, unless an unreasonable danger to the community will result or the accused is an extreme flight risk.”

safety is through the appointment of a special master. Nonprofit Amici strongly support that outcome. Where the parties do not seem to agree is the extent to which individualized decisions should be made with respect to each person subject to release. Specifically, Respondents appear to believe that the Petition seeks to dispense entirely with any kind of individualized review. *See* Resp’t Answer at 4 (arguing against “wholesale release . . . without *any* consideration” of the individual circumstances of each person (emphasis in original)).

Nonprofit Amici submit that appointment of a special master would mitigate concerns about the absence of individualized review by striking an appropriate balance between so-called “wholesale” release, on the one hand, and person-by-person decision-making, on the other. A special master could establish a reduction target, set clear standards to reach that target, and then apply them rapidly to people whom the parties present for the special master’s consideration. The special master could do this all while keeping in mind the ultimate purpose of the relief requested by the Petition: expeditiously decarcerating jails and prisons to protect both the broader community and those still behind bars. In sum, the appointment of a special master would enable the release of specific individuals within the proposed categories of release with the reasonable conditions needed to ensure public safety and health.

E. Additional Conditions of Release—Such As COVID-19 Testing or Verification of “Safe” Housing—Are Both Unconstitutional And Irrational

Respondents—in both the present proceeding and the other pending proceeding raising similar issues, *see* SCPW-20-0000200⁸—argue that, even if an initial determination is made that a person can and should be released under present circumstances, that person should nonetheless remain incarcerated unless certain *additional* conditions are met, including that: (1) the person

⁸ Nonprofit Amici respectfully request that the Court take judicial notice of the records and files in No. SCPW-20-0000200, *Office of the Public Defender v. Clare E. Connors*.

get tested, and show a “negative” result, for COVID-19,⁹ (2) the person, acting through Petitioner, “verify” the existence of a “safe place to live,” and (3) “electronic bracelet” monitoring be implemented. *See* Resp’t Answer at 2, 3, 6. Respondents offer no legal authority justifying blanket imposition of these additional, severe barriers to release. To the extent these added requirements in effect deny people’s release entirely, they would be unconstitutional for the reasons already described (Section II.B). Moreover, such “safeguards” are wholly irrational because they defeat the very goal of effectuating the *expeditious* release of people in Hawai‘i jails and prisons, who collectively face imminent serious and potentially life-threatening harm.

To the extent the Court does share some of Respondents’ concerns, there are alternative steps that the Court (and/or a special master) could take to address them *without* imposing Respondents’ blanket release conditions. For example, to the extent that vulnerable detainees have been exposed to people confirmed to have COVID-19, they can be tested immediately in concert with the local health authorities. Those who test positive can be continuously monitored in segregated rooms, released to home quarantine, or transferred to local hospitals if medically indicated. Those who test negative can be released to home quarantine for 14 days while awaiting symptoms or a positive test result. Where a suitable location for home quarantine is unavailable, these individuals could be released to housing identified by state or county officials.

With respect to requiring a “safe place to live,” Respondents again appear to be imposing

⁹ *See, e.g.*, SCPW-20-000020, Nadamoto Answer at 2 (seeking “measures to ensure that released inmates are negative for COVID-19”); SCPW-20-000020, Guzman Answer at 6 (seeking requirement that “all inmates be medically screened before being released”). Notably, Respondents’ Pandemic Response Plan concedes that COVID-19 testing capacity is still very limited even for people showing symptoms. Resp’t Answer, Ex. E at 9 (“It is unlikely that hospitals will have the capacity to evaluate inmates with mild respiratory illnesses.”).

needlessly strict measures that cannot be justified by the present emergency situation.¹⁰

Respectfully, it is not Respondents' prerogative to detain someone in potentially life-threatening conditions simply because that person cannot "verify" a "safe place to live."

Finally, electronic bracelet monitoring need not—and should not—be imposed categorically. Release under these emergency circumstances does not mean commutation. Respondents would still have the ability to supervise those who are released through other means short of electronic bracelets. For example, pretrial detainees would still be under the supervision of the DPS Intake Services Centers Division. Further, Respondents already appear to have adopted some less-severe measures in light of the pandemic, so it surprising that they now assert that the incredibly onerous measure of electronic bracelets must be imposed on every person released.

III. CONCLUSION

Nonprofit Amici respectfully request that the Court consider these facts and legal doctrines as part of its disposition of the State of Hawai'i Office of the Public Defender's Petition. Further, Nonprofit Amici respectfully submit that appointment of a special master to oversee a prompt and effective release process for people detained and incarcerated in jails and prisons is warranted here. Failure to take immediate action may lead to many people needlessly and unjustly experiencing severe suffering and even death. This Court should act.

¹⁰ Respondents also incorrectly raise the prospect of criminal liability under Governor Ige's stay-at-home order as justifying their demand that every person who is at risk of becoming homeless first "verify" a "safe place to live." Resp't Answer at 6. But that emergency proclamation explicitly "exempt[s]" "[p]ersons experiencing homelessness" from any criminal penalties. *See* Office of the Governor, State of Hawaii, Third Supplementary Proclamation (Mar. 23, 2020), https://governor.hawaii.gov/wp-content/uploads/2020/03/2003162-ATG_Third-Supplementary-Proclamation-for-COVID-19-signed.pdf.

DATED: Honolulu, Hawai'i, April 1, 2020.

Respectfully submitted,

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MATEO CABALLERO

/s/ Thomas A. Helper
Thomas A. Helper

/s/ Jongwook "Wookie" Kim
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Appendix A: Nationwide Court Actions to Reduce Incarceration in Light of COVID-19¹

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

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

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

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

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

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

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| | D. Mass, Judge Mark L. Wolf | Oral Order | <ul style="list-style-type: none"> Judge Wolf ordered the release, with conditions, from ICE custody a member of the class in <i>Calderon v. Nielsen</i> based, in part, on the “extraordinary circumstances” posed by COVID-19.³¹ |
| | S.D.N.Y., Judge George B. Daniels | Memorandum Decision and Order | <ul style="list-style-type: none"> Judge Daniels ordered the release, under <i>Mapp v. Reno</i>, 241 F.3d 221 (2d Cir. 2001), of an individual as there was likelihood of success on the merits and COVID-19 risks and individual’s own medical issues constituted “extraordinary circumstances warranting release.”³² |
| | S.D.N.Y., Judge Alison J. Nathan | Opinion and Order | <ul style="list-style-type: none"> Judge Nathan ordered the immediate release of four detainees finding “no evidence that the government took any specific action to prevent the spread of COVID-19 to high-risk individuals . . . held in civil detention.”³³ |
| | S.D.N.Y., Judge Analisa Torres | Memorandum Decision and Order | <ul style="list-style-type: none"> Judge Torres granted immediate release on recognizance for ten individuals in immigration detention who have a variety of chronic health conditions that put them at high risk for COVID-19. These conditions include obesity, asthma, diabetes, pulmonary disease, history of congestive heart failure, respiratory problems, gastrointestinal problems, and colorectal bleeding. The court held detainees face serious risks to their health in confinement and “if they remain in immigration detention constitutes irreparable harm warranting a TRO.”³⁴ |
| | M.D. Pa., Judge John E. Jones III | Memorandum and Order | <ul style="list-style-type: none"> Judge Jones III ruled that federal immigration authorities must immediately release the ten individuals in immigration detention who are at high risk for contracting COVID-19 due to their age or medical conditions or both. In his decision, Judge Jones III noted, “At this point, it is not a matter of if COVID-19 will enter Pennsylvania prisons, but when it is finally detected therein. It is not unlikely that COVID-19 is already present in some county prisons.”³⁵ |

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

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- ²Administrative Order, No. 2020-00010, Ala. Ct. App. (Mar. 18, 2020), <https://drive.google.com/file/d/1I4QLwsytSVkdOuo5p6qb1JcuFWcAV4oA/view?usp=sharing>. Note: the original order has been revised to provide discretion to the Sheriffs. See Mike Carson, *Alabama Judge Orders Jail Inmates Released, then Leaves it Up to Sheriffs*, AL.Com (Mar. 19, 2020), <https://www.al.com/news/2020/03/alabama-judge-orders-jail-inmates-released-then-leaves-it-up-to-sheriffs.html>.
- ³ Scott Buffon, *Coconino County Jail Releases Nonviolent Inmates in Light of Coronavirus Concerns*, Arizona Daily Sun (updated Mar. 25, 2020), https://azdailysun.com/news/local/coconino-county-jail-releases-nonviolent-inmates-in-light-of-coronavirus/article_a6046904-18ff-532a-9dba-54a58862c50b.html.
- ⁴ Advisory from California Chief Justice Tani Cantil-Sakauye to Presiding Judges and Court Executive Officers of the California Courts (Mar. 20, 2020), <https://newsroom.courts.ca.gov/news/california-chief-justice-issues-second-advisory-on-emergency-relief-measures>.
- ⁵ *Standing Order of the Sacramento Superior Court*, No. SSC-20-PA5 (Mar. 17, 2020), <https://www.saccourt.ca.gov/general/standing-orders/docs/ssc-20-5.pdf>.
- ⁶ Kyle C. Barry, *Some Supreme Courts Are Helping Shrink Jails to Stop Outbreaks. Others Are Lagging Behind.*, The Appeal (Mar. 25, 2020), <https://theappeal.org/politicalreport/some-supreme-courts-are-helping-shrink-jails-coronavirus>; John Cheves, *Chief Justice Pleads for Kentucky Inmate Release Ahead of COVID-19 but Progress Slow*, Lexington Herald Leader (Mar. 23, 2020), <https://www.kentucky.com/news/coronavirus/article241428266.html>.
- ⁷ Emergency Order Vacating Warrants for Unpaid Fines, Unpaid Restitution, Unpaid Court-Appointed Counsel Fees, and Other Criminal Fees (Mar. 17, 2020), <https://www.courts.maine.gov/covid19/emergency-order-vacating-warrants-fines-fees.pdf>.
- ⁸ Joint Statement of Chief Justice Bridget M. McCormack, Mich. Sup. Ct. and Sheriff Matt Saxton, Exec. Dir., Mich. Sheriff Ass'n (Mar. 26, 2020), [https://courts.michigan.gov/News-Events/press_releases/Documents/CJ%20and%20MSA%20Joint%20Statement%20draft%202%20\(003\).pdf](https://courts.michigan.gov/News-Events/press_releases/Documents/CJ%20and%20MSA%20Joint%20Statement%20draft%202%20(003).pdf).
- ⁹ Letter from Chief Justice Mike McGrath, Mont. Sup. Ct. to Mont. Ct. of Ltd. Jurisdiction Judges (Mar. 20, 2020), <https://courts.mt.gov/Portals/189/virus/Ltr%20to%20COLJ%20Judges%20re%20COVID-19%20032020.pdf?ver=2020-03-20-115517-333>.
- ¹⁰ Consent Order, *In the Matter of the Request to Commute or Suspend County Jail Sentences*, No. 084230 (N.J. March 22, 2020), https://www.aclu-nj.org/files/5415/8496/4744/2020.03.22_-_Consent_Order_Filed_Stamped_Copy-1.pdf.
- ¹¹ *People of the State of New York, ex rel., v. Cynthia Brann*, No. 260154/2020 (Sup. Ct. NY Mar. 25, 2020), https://linkprotect.cudasvc.com/url?a=https%3a%2f%2flegalaidnyc.org%2fwp-content%2fuploads%2f2020%2f03%2fLAS-Mass-Parole-Holds-Writ.pdf&c=E,1,pDbcoVtCJ0c6j6E8cI3m276yaRxs-nzttikQuvDWwS91mRHj6RhL8o5pEJmJl-lk86sC7-f1rq9dTih2Pe3ZmAUcoZCiC9er2g4Z4mL_ToQ,&typo=1; see also Frank G. Runyeon, *NY Judges Release 122 Inmates as Virus Cases Spike in Jails*, Law360 (March 27, 2020), <https://www.law360.com/newyork/articles/1257871/ny-judges-release-122-inmates-as-virus-cases-spike-in-jails>.

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- ¹² *Jeffrey v. Bran*, (Sup. Ct. NY Mar. 26, 2020). See Press Release, Redmon Haskins, *Legal Aid Wins Release of 16 Incarcerated New Yorkers at a High Risk of COVID-19 from City Jails* (Mar. 26, 2020), <https://legalaidnyc.org/wp-content/uploads/2020/03/03-26-20-Legal-Aid-Wins-Release-of-16-Incarcerated-New-Yorkers-at-a-high-risk-of-COVID-19-from-City-Jails.pdf>; see also Runyeon, *NY Judges Release 122 Inmates*, *supra* note 11.
- ¹³ Press Conference, Ohio Chief Justice Maureen O'Connor and Gov. Mike DeWine (Mar. 19, 2020); see also WLWT5, *Release Ohio Jail Inmates Vulnerable to Coronavirus, Chief Justice Urges* (Mar. 19, 2020), <https://www.wlwt.com/article/release-ohio-jail-inmates-vulnerable-to-coronavirus-chief-justice-urges/31788560#>.
- ¹⁴ Memorandum from Chief Justice Beatty, Sup. Ct of S.C to Magistrates, Mun. Judges, and Summary Ct. Staff (March 16, 2020), <https://www.sccourts.org/whatsnew/displayWhatsNew.cfm?indexId=2461>.
- ¹⁵ Ryan Autullo, *Travis County Judges Releasing Inmates to Limit Coronavirus Spread*, *Statesman* (Mar. 16, 2020), <https://www.statesman.com/news/20200316/travis-county-judges-releasing-inmates-to-limit-coronavirus-spread?fbclid=IwAR3VKawwn3bwSLSO9jXBxXNRuaWd1DRLsCBFc-ZkPN1INWW8xnzLPvZYNO4>.
- ¹⁶ Order, *Administrative Order for Court Operations During Pandemic* (Utah Mar. 21, 2020), <https://www.utcourts.gov/alerts/docs/20200320%20-%20Pandemic%20Administrative%20Order.pdf>.
- ¹⁷ Am. Order, *In the Matter of Statewide Response by Washington State Courts to the Covid-19 Public Health Emergency*, No. 25700-B-607 (Wash. Mar. 20, 2020), <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/Supreme%20Court%20Emergency%20Order%20re%20CV19%20031820.pdf>.
- ¹⁸ Order Adopting Temporary Plan to Address Health Risks Posed by the COVID-19 Pandemic, *In the Matter of the Wyoming Supreme Court's Temporary Plan Regarding COVID-19 Pandemic* (Wyo. Mar. 18, 2020), <http://www.courts.state.wy.us/wp-content/uploads/2020/03/COVID-19-Order.pdf>.
- ¹⁹ Minute Order, *United States v. Michaels*, 8:16-cr-76-JVS, (C.D. Cal. Mar. 26, 2020), https://drive.google.com/file/d/1BeWih63M7FKreKEvLJyIQevYSivGA_PU/view.
- ²⁰ Edmund H. Mahony, *Courts Ponder the Release of Low Risk Inmates in an Effort to Block the Spread of COVID-19 to the Prison System*, *Hartford Currant* (Mar. 24, 2020), <https://www.courant.com/coronavirus/hc-news-covid-inmate-releases-20200323-20200324-oreyf4kdbdfbe3adv6u6ajsj57u-story.html>.
- ²¹ Minute Order, *United States v. Jaffee*, No. 19-cr-88 (RDM) (D.D.C. Mar. 26, 2020), <https://drive.google.com/file/d/1AYfIU6QKCOElpX5Vh3Af6BDqO8goZ5WE/view>.
- ²² *United States v. Harris*, No. 19-cr-356 (RDM) (D.D.C. Mar. 26, 2020), <https://drive.google.com/file/d/1aO3BNOKB8ukL20A76Mu7Fn0GyCng0Ras/view>.
- ²³ *United States v. Barkma*, No. 19-cr-0052 (RCJ-WGC), 2020 U.S. Dist. LEXIS 45628, at *3 (D. Nev. Mar. 17, 2020), https://drive.google.com/file/d/1o35MokiprkmhzCUUieg_Eua6e05v4zOw/view.

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- ²⁴ *United States v. Copeland*, No. 2:05-cr-135-DCN, at 7 (D.S.C. Mar. 24, 2020), <https://drive.google.com/file/d/1tyA8Kjvld23QTL0Wo7xbAdqLEOCCVC4q/view>.
- ²⁵ *United States v. Garlock*, No. 18-CR-00418-VC-1, 2020 WL 1439980, at *1 (N.D. Cal. Mar. 25, 2020), https://drive.google.com/file/d/1H47EQMXtQZkXFv_GXSffAV6Xkse3-kpl/view.
- ²⁶ *In The Matter Of The Extradition Of Alejandro Toledo Manrique*, No. 19-mj-71055-MAG, 2020 WL 1307109, at *1 (N.D. Cal. Mar. 19, 2020), <https://drive.google.com/file/d/1AfU1ft4Lcm60QbPhjgo9HgGAHkbPKPzD/view>.
- ²⁷ AM. Order, *United States v. Perez*, 19-cr-297 (PAE), at 1 (S.D.N.Y. Mar. 19, 2020), <https://drive.google.com/file/d/17xE8qdGeeTI2d2dWjNDfwmXLc8GxTtfA/view>.
- ²⁸ *United States v. Stephens*, No. 15-cr-95-AJN, 2020 WL 1295155, at *2-3 (S.D.N.Y. Mar. 19, 2020), <https://drive.google.com/file/d/1hEhz9olCfaKRinDvUOKqjDTcx3-nc4vq/view>.
- ²⁹ *Xochihua-Jaimes v. Barr*, No. 18-cv-71460 (9th Cir. Mar. 23, 2020), <https://drive.google.com/file/d/16eh6qMzihmNISEq0SzmCSQx98OiLn38l/view>.
- ³⁰ *Castillo v. Barr*, No. 20-cv-605 (TJH)(AFM), at 10 (C.D.Cal. Mar. 27, 2020), <https://drive.google.com/file/d/1BeFuU-Lrjj-VVeA6QA2O7zLud7aWlvEN/view>.
- ³¹ Transcript of Oral Argument, at 3-4, 6, *Jimenez v. Wolf*, No. 18-10225-MLW (D. Mass. Mar. 26, 2020), <https://www.courtlistener.com/recap/gov.uscourts.mad.195705/gov.uscourts.mad.195705.507.1.pdf>.
- ³² *Jovel v. Decker*, No. 12-cv-308 (GBD), at 2(S.D.N.Y. Mar. 26, 2020), <https://drive.google.com/file/d/1mrJ9WbCgNGeyWn1cy3xAvo61yJWnaDe8/view>.
- ³³ *Coronel v. Decker*, No. 20-cv-2472 (AJN), at 10 (S.D.N.Y. Mar. 27, 2020), <https://legalaidnyc.org/wp-content/uploads/2020/03/20cv2472-Op.-Order-3.27.20.pdf>.
- ³⁴ *Basank v. Decker*, No. 20-cv-2518 (AT), at 7, 10 (S.D.N.Y. Mar. 26, 2020), https://drive.google.com/file/d/1FJ7tU9JCskKPh4xkoe4j3YgoQ5y2_y0P/view.
- ³⁵ *Thakker v. Doll*, No. 20-cv-480 (JEJ), at 8 (M.D. Pa. Mar. 31, 2020), https://www.aclupa.org/sites/default/files/field_documents/memo_and_order_granting_tro_and_release.pdf.