

April 16, 2020

Hon. Donald W. Lemons
Supreme Court of Virginia
100 North Ninth Street
Richmond, Virginia 23219

Dear Chief Justice Lemons,

We are writing to request that the Virginia Supreme Court issue emergency guidance and order members of the judiciary to take legal action to mitigate harm that the COVID-19 pandemic is inflicting upon people incarcerated in prisons and jails, correctional staff, first responders and medical staff who treat them, and people of the Commonwealth of Virginia.

During this pandemic, correctional facilities are at particularly high risk for the spread of COVID-19. This is due to several factors: the close proximity of individuals in those facilities; their reduced ability to protect themselves through social distancing; the lack of necessary medical and hygiene supplies ranging from hand sanitizer to protective equipment; ventilation systems that encourage the spread of airborne diseases; difficulties quarantining individuals who become ill; the increased susceptibility of the population in jails and prisons; the fact that jails and prisons normally have to rely heavily on outside hospitals that will become unavailable during a pandemic; and loss of both medical and correctional staff to illness. Josiah Rich, *et al.*, *We Must Release Prisoners to Lessen the Spread of Coronavirus*, WASH. POST (Mar. 17, 2020), www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-lessen-spread-coronavirus. COVID-19 has already been reported in Virginia's facilities, with the first confirmed fatality occurring on April 14, 2020 at the Virginia Correctional Center for Women ("VCCW"), where 21 individuals in custody and 23 staff members have been diagnosed. The window for action is narrowing.

While judges, commonwealth's attorneys, jail officials and law enforcement in a limited number of localities in the Commonwealth have adopted incremental case-by-case measures to limit jail populations, the courts and other actors in the criminal legal system in too many judicial districts are taking a business-as-usual approach, failing to address, or even recognize, the looming public health catastrophe. Ned Oliver, *Some Virginia cities are pushing to clear jails of nonviolent offenders. Others? Not so much.*, VA. MERCURY (Mar. 26, 2020), www.virginiamercury.com/2020/03/26/some-virginia-cities-are-pushing-to-clear-jails-of-nonviolent-offenders-others-not-so-much/. Such a



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piecemeal approach is insufficient to address the urgency of the moment. It is insufficient as a matter of epidemiology to protect the communities in which correctional institutions are located. It is insufficient as a matter of law to address the constitutional violations that are occurring by reason of the de facto death sentences being imposed by failure to take effective action to mitigate exposure and the risk of death by releasing from correctional and detention facilities any people who do not present an imminent threat of bodily harm to another person. Judicial inaction in some parts of the Commonwealth will also result in a criminal legal system that is experienced differently by Virginians depending on which side of a jurisdictional line they live.



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This Court has the legal authority to take action to preserve the rights of all detained individuals and to ensure compliance with the U.S. and Virginia Constitutions. The prohibitions against cruel and unusual punishment contained in Article I, § 9 of the Virginia Constitution and the Eighth Amendment of the United States Constitution, demand that the state provide for the “basic human needs” of prisoners in its custody and prohibits state officials from acting with deliberate indifference to a convicted prisoner’s serious medical needs. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 104 (1976). Further, “the due process clauses of the Federal and Virginia Constitutions provide that no person shall be deprived of life, liberty, or property without due process of law.” *Walton v. Commonwealth*, 255 Va. 422, 497 S.E.2d 869 (1998) (citing U.S. Const. amend. XIV, § 1; Va. Const. art. I, § 11). Accordingly, incarcerated people have a constitutionally protected liberty interest in avoiding “atypical and significant hardship . . . in relation to the ordinary incidents of prison life.” *Sandin v. Conner*, 515 U.S. 472, 484 (1995); *see also id.* (a hardship may “exceed[] the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force”).

We ask this Court to use its authority to order all judges and magistrates in the Commonwealth to take all possible actions within their power to reduce the populations of the jails and prisons in their jurisdiction immediately, including but not limited to, releasing from custody as many people as possible who are the highest risk, as defined by the *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* issued by the Centers for Disease Control & Prevention (“CDC”), *available at* www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html. Courts should be directed to release individuals who are above the age of 60, or those with chronic illnesses or disabilities, or who are pregnant, unless their continued confinement is necessary to prevent an imminent and serious threat to public safety. In addition, this Court should require lower

courts to expedite individualized determinations of suitability for release consistent with public health and public safety, and consider in probation detention hearings, bail determination and reconsideration hearings, and dangerousness hearings the serious health risks posed by detention to the defendant, other incarcerated individuals, and the community. The Court should direct judges to vacate bench warrants, cease issuing new bench warrants for failures to appear or failure to pay outstanding fees and fines, and suspend all probation, parole, or pretrial conditions adherence to which would require the individual to violate the CDC's social distancing or self-quarantine instructions.

We ask this Court to appoint an expert or Special Master to make recommendations to this Court and the lower courts regarding how many and which individuals to order released from custody so as to ensure that the number of individuals remaining in custody can be housed consistently with CDC Guidance on best practices to prevent the spread of COVID-19, including the requirement that prisoners be able to maintain six feet of space between them.

This is an extraordinary time that requires immediate action. This Court has the ability to take measures to safeguard the health and safety of individuals who are in custody and to prevent other individuals from being taken into custody who do not pose an imminent risk of bodily harm to another person. COVID-19 outbreaks within overcrowded facilities, institutions in which appropriate physical distancing is not possible, or sites that lack sufficient hygiene and sanitary products or procedures, will not only place the people held in these facilities at risk of serious illness or death, but will also endanger the lives and well-being of staff and service providers and contractors who work in the facilities, their families, and members of the community at large.

We ask this Court to join courts in at least twelve other states—Alabama, Alaska, Hawaii, Maine, Massachusetts, Montana, New Jersey, Ohio, Pennsylvania, South Carolina, Texas, Washington, and the District of Columbia—that have already taken significant steps to limit incarceration during this crisis. *Responses to the COVID-19 Pandemic*, PRISON POLICY INITIATIVE, www.prisonpolicy.org/virus/virusresponse.html (last visited Apr. 15, 2020). These courts have acted in recognition of the extraordinary public health risk posed by the transmission of COVID-19 in custodial settings.

We respectfully request that this Court issue emergency guidance and require all judges and magistrates to adhere to this guidance. We are continuing to explore all options to protect the vulnerable people in our prisons and jails from this deadly virus. Time is of the essence if we are to stop the spread of the COVID-19 disease in our custodial facilities across Virginia. If this Court does not take positive action on this request



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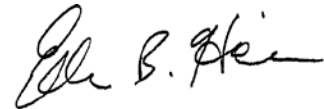
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by Tuesday, April 21, 2020, we will proceed with other appropriate action, including legal action, to ensure that the constitutional claims of people confined in our jails and prisons are addressed.

Thank you for your time and consideration of this matter.

Respectfully,



Eden Heilman
Legal Director

ACLU

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CC: Karl R. Hade, Executive Secretary of the Court
Douglas B. Robelen, Clerk of the Court