

IN THE SUPREME COURT
OF THE STATE OF INDIANA

No. _____

IN THE MATTER OF:)
)
PETITION REQUESTING THE INDIANA SUPREME)
COURT TO ENGAGE IN EMERGENCY RULEMAKING)
TO ADDRESS THE ISSUE OF IMPRISONED)
PERSONS AND THE COVID-19 CRISIS)

PETITION FOR EMERGENCY RULEMAKING

COMES NOW the American Civil Liberties Union of Indiana, by its counsel, and as set forth below requests that this Court engage in emergency rulemaking to address the urgent dangers that the COVID-19 pandemic poses for persons incarcerated in Indiana’s prisons and jails. In support of this request, the American Civil Liberties Union of Indiana states as follows:

I. Introduction

1. The world is facing an unprecedented health emergency caused by the spread of the novel coronavirus, which causes the potentially fatal disease COVID-19. There is no vaccine for the virus, and there is no cure for the disease. The number of confirmed cases of COVID-19 is increasing by the hour; the number of hospitalizations and fatalities is similarly spinning out of control. The exponential rise in the prevalence of COVID-19 is caused in part by the fact that the virus is highly transmissible. In order to slow the spread of the disease, states across the country—including Indiana—have implemented

“stay-at-home” or “shelter-in-place” orders, have closed schools, governmental offices, and countless commercial and other establishments, and have restricted public gatherings. The Centers for Disease Control and Prevention has urged social distancing, whereby persons must remain at least six feet away from every other person, and has recommended the implementation of various hygienic measures.

2. None of the recommended measures for mitigating the spread of COVID-19, however, are available to persons confined in correctional facilities or for those who interact with them. The Indiana Department of Correction (“DOC”) houses more than 25,000 persons in close proximity to one another and to their keepers; Indiana’s county jails house thousands more. Limited staff and resources mean that surfaces are unlikely to be frequently cleaned, if at all. Like a cruise ship or a nursing home, these institutions represent environments in which the coronavirus can easily gain a foothold and, when it does, spread rapidly. And many of those detained are older or have been diagnosed with underlying health conditions that place them at heightened risk for suffering serious, potentially fatal, illness as a result of COVID-19.

3. On behalf of institutionalized persons most at risk, the American Civil Liberties Union of Indiana (“ACLU of Indiana”) files this emergency petition requesting that this Court take immediate action—described below—designed to stem the progression of COVID-19 in the DOC and Indiana’s county jails. These are extraordinary times, and they call for affirmative action by Indiana’s judiciary and, ultimately, for extraordinary relief.

II. The interests of the ACLU

4. The ACLU of Indiana (incorporated as the Indiana Civil Liberties Union Foundation, Inc. and the Indiana Civil Liberties Union, Inc.) is a prominent civil rights organization and is the Indiana affiliate of the national American Civil Liberties Union.

5. Of specific relevance to this petition is that the ACLU of Indiana frequently represents prisoners in civil actions challenging conditions of their confinement as violating the United States Constitution. At the current time the ACLU of Indiana has numerous actions currently pending where its attorneys represent prisoners confined in the DOC or county jails.¹ The county jail cases are class actions, or putative class actions, where attorneys from the ACLU of Indiana are representing, or are seeking to represent, not only the prisoners who filed the action, but all the prisoners in the jail:

- *Bell v. Henry County Sheriff*, No. 1:19-cv-00557-SEB-MJD (S.D. Ind.) (certified class action with the class defined as all Henry County Jail prisoners)
- *Copeland v. Wabash County, Indiana*, No. 3:20-cv-154-JD-MGG (N.D. Ind.) (class action request pending with the class defined as all Wabash County Jail prisoners)
- *Huerta v. Ewing*, No. 2:16-cv-397-JMS-MJD (S.D. Ind.) (certified class action with the class defined as all Vigo County Jail prisoners)

¹ Throughout this petition the ACLU of Indiana will use the term “DOC” to refer not only to institutions directly operated by the DOC, but also to the New Castle Correctional Facility and Heritage Trail Correctional Facility, which are run by a private corporation under contracts with the DOC. Similarly, the term “county jail” refers not only to jails operated directly by Indiana’s counties but also to private facilities where the counties have contracted with private corporations to house their prisoners.

- *Indiana Protection and Advocacy Servicers Comm'n v. Commissioner, Indiana Dep't of Correction*, No. 1:08-cv-01317-TWP-MJD (S.D. Ind.) (certified class action with the class defined to include seriously mentally ill prisoners in segregation)
- *LaCroix v. Commissioner, Indiana Dep't of Correction*, No. 1:19-cv-00557-SEB-MJD (S.D. Ind.)
- *Loveday v. Commissioner, Indiana Dep't of Correction*, No. 1:20-cv-00032-JRS-TAB (S.D. Ind.)
- *Marbley v. Tafoya*, No. 1:19-cv-00557-SEB-MJD (S.D. Ind.)
- *Miller v. Marshall County, Indiana*, 3:19-cv-00842-DRL-MGG (N.D. Ind.) (certified class action with the class defined as all Marshall County Jail prisoners)
- *Morris v. Sheriff of Allen County*, No. 1:20-cv-00034-DRL-SLC (N.D. Ind.) (certified class action with the class defined as all Allen County Jail prisoners)
- *Richardson v. Monroe County, Sheriff*, No. 1:08-cv-174-RLY-MJD (S.D. Ind.) (certified class action with the class defined as Monroe County Jail prisoners)
- *Stilwell v. Sheriff of Gibson County*, No. 3:19-cv-30-RLY-MPB (S.D. Ind.) (certified class action with the class defined as Gibson County Jail prisoners)
- *Sweeney v. Brown*, 2:19-cv-00285-JPH-MJD (S.D. Ind.)
- *Sweeney v. Commissioner, Indiana Dep't of Correction*, No. 1:17-cv-03550-JMS-MPB (S.D. Ind.) (certified class action with the class defined to include all DOC prisoners)
- *Wertz v. Brown*, 2:19-cv-615 JRS-DLP (S.D. Ind.)
- *Williams v. Carter*, No. 1:19-cv-05032-TWP-MJD (S.D. Ind.)
- *Woods v. Carter*, No. 1:19-cv-4586-SEB-MJD (S.D. Ind.)

6. Therefore, the ACLU currently represents a significant number of the prisoners currently incarcerated in Indiana.

7. The ACLU of Indiana has an intake process where persons seeking assistance from the organization may contact it requesting that its attorneys review their cases. In 2019, the ACLU of Indiana received 3,100 requests for assistance, more than 60% of which came from prisoners, within both the DOC and county jails, with a small number coming from prisoners incarcerated in the federal facilities in Terre Haute. In the first two months of 2020, the ACLU of Indiana received requests for assistance from at least 375 separate prisoners.

8. Many of the prisoners seeking assistance who are housed within county jails and the DOC indicate that they have serious medical issues. The ACLU of Indiana also regularly receives contacts from prisoners who are older than 65.

9. “Prisons and jail officials ‘ha[ve] a constitutional duty to take reasonable steps to protect the prisoners’ safety and bodily integrity.’” *Cox v. Glanz*, 800 F.3d 1231, 1247-48 (10th Cir. 2015) (quoting *Berry v. City of Muskogee*, 900 F.2d 1489, 1499 (10th Cir. 1990) (alterations by the court)). Given that the organizational mission of the ACLU of Indiana includes the protection of the civil liberties and constitutional rights of vulnerable populations, and given that its attorneys represent so many prisoners, the ACLU of Indiana has a strong interest in ensuring that the rights of prisoners in Indiana are secured and the prisoners’ safety is protected to the greatest extent as possible.

III. The power and authority of this Court

10. The Indiana Constitution, Art. 7, § 4, provides that this Court has original jurisdiction regarding “the supervision of the exercise of jurisdiction by the other courts of the State; and issuance of writs necessary or appropriate in aid of its jurisdiction.”

11. This Court has inherent authority to issue opinions, even *sua sponte*, “wherein questions are presented which directly concern this Court.” *In re Judicial Interpretation of 1975 Senate Enrolled Act No. 441*, 263 Ind. 350, 332 N.E.2d 97 (1975) (*sua sponte* declaring a newly enacted statute to be unconstitutional as it impinged on the Court’s exclusive constitutional powers to regulate the practice of law).

12. This Court also “has authority to adopt rules of procedure governing the conduct of litigation in our judicial system.” *Augustine v. First Federal Sav. & Loan Ass’n of Gary*, 270 Ind. 238, 241, 384 N.E.2d 1018, 1020 (1979) (citation omitted).

13. This Court’s rulemaking authority is generally exercised according to established procedures. However, this Court has held that when an emergent situation arises, it has “the inherent responsibility and authority” to address the issue and “remove the impediment” that is thwarting the administration of justice. *Castle v. Fleenor*, 262 Ind. 503, 504, 318 N.E. 2d 567 (1974). In *Fleenor*, this Court appointed a successor special judge when the original special judge died, even though Trial Rule 79, the rule concerning the appointment of special judges, was silent as to what was to occur in this circumstance. The Court noted that although it was “reluctant to adopt or amend rules, except in accordance with the established procedure” it was necessary to act in this situation

pursuant to its “inherent responsibility and authority.” *Id.* The Court “not only has the right, but the responsibility under the Constitution, to formulate rules and regulations so that the constitutional rights of litigants may be fully recognized and applied in the administration of justice in the courts.” *State ex rel Uzelac v. Lake Criminal Court*, 247 Ind. 87, 90-91, 212 N.E.2d 21, 23 (1965).

14. Although this Court has the authority to issue rules and to compel courts to act that refuse to do so, it has no authority “to direct or control judicial discretion in the performance of the act, or to predetermine the decision to be made, or to prescribe the judgment to be rendered.” *State ex rel. Beatty v. Nichols*, 233 Ind. 432, 434, 120 N.E.2d 407, 408 (1954) (further citations omitted).

15. This Court has recently exercised its authority to engage in rulemaking specifically concerning the COVID-19 crisis by promulgating an emergency rule on March 23, 2020, which tolled various deadlines and time limits. *In re Administrative Rule 17 Emergency Relief for Indiana Trial Courts Relating to 2019 Novel Coronavirus (COVID-19)*, --N.E.3d--, No. 20S-CB-123, 2020 WL 1329684 (Ind. Mar. 23, 2020). In doing so, this Court reiterated its authority to act “to ensure the orderly and fair administration of justice during this emergency.” *Id.*, 2020 WL 1329684, at *1.

IV. The current COVID-19 crisis

16. Coronavirus disease 2019 (“COVID-19”) is an infectious disease caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) (“coronavirus”). The disease

was first identified last year in Wuhan, China and has since spread to more than two hundred countries, resulting in a global pandemic. Both the World Health Organization (<https://www.who.int/emergencies/diseases/novel-coronavirus-2019>) and the Centers for Disease Control and Prevention (“CDC”) (<https://www.cdc.gov/coronavirus/2019-ncov/index.html>) publish frequently updated data, guidelines, and recommendations concerning the pandemic; unless otherwise noted, information described herein is taken from these authoritative, publicly available sources (all internet citations last visited on Mar. 30, 2020).

17. As of 7:20 a.m. on March 30, 2020, 735,560 confirmed cases of COVID-19 have been reported worldwide; 143,055 of those are in the United States, and 1,513 are in Indiana. See Johns Hopkins University & Medicine: Coronavirus Resource Center, *Coronavirus COVID-19 Global Cases (“Global Cases”)*, at <https://coronavirus.jhu.edu/map.html>. However, due to widely reported deficiencies in testing capacities—and because many infected persons may be asymptomatic or experience only mild symptoms—the actual prevalence of COVID-19 is likely far greater than the number of confirmed cases. As a result of community spread, the number of persons infected with COVID-19 is increasing seemingly by the minute: some experts suggest that hundreds of millions of persons in the United States will be infected with COVID-19 during the course of the pandemic, a potentiality that could result in hundreds of thousands of deaths. See Sheri Fink, *Worst-*

Case Estimates for U.S. Coronavirus Deaths, N.Y. Times, Mar. 13, 2020, at <https://www.nytimes.com/2020/03/13/us/coronavirus-deaths-estimate.html>.

18. Common symptoms of COVID-19 include fever, cough, and shortness of breath; muscle pain, diarrhea, and sore throat are less common. While the majority of cases result in mild symptoms, some persons progress to pneumonia, organ failure, or even death. As of 7:20 a.m. on March 30, 2020, 34,686 fatalities have been reported worldwide, 2,513 in the United States, and 32 in Indiana. *See Global Cases, supra*.

19. As of March 23rd, the rate of deaths per the number of diagnosed cases was 4.4%, although given the number of undiagnosed cases experts estimate the fatality rate at approximately 1.4%. This number differs widely, however, based on an individual's age and underlying health conditions: persons at heightened risk include those over the age of 65 as well as those with chronic lung disease or asthma, those with serious heart conditions, those who are immunocompromised (including those undergoing cancer treatment), those with severe obesity, and those with diabetes, renal failure, or liver disease. For certain categories of these persons, the fatality rate may be as high as 10-27%. Even this rate, however, can be expected to be higher when an individual with COVID-19 lacks access to potentially life-saving medical equipment, such as ventilators, which is in increasingly short supply even for the non-incarcerated population. Like the number of confirmed cases, the number of fatalities from the disease—across the state, across the country, and across the globe—is increasing daily.

20. COVID-19 is highly contagious: experts indicate that it may be 2-3 times more contagious than the seasonal flu. The disease may be transmitted through close proximity to others who have the virus or with objects that have been contacted by those persons. It typically spreads from person to person through small droplets from the nose or mouth that are expelled when a person with COVID-19 coughs or exhales. These droplets may either be inhaled directly or may land on objects or surfaces around the infected person; when they land on surfaces around the infected person the disease may be transmitted when that surface is touched by another person and then that person touches his or her eyes, nose, or mouth. The disease may be transmitted even when an infected person is asymptomatic or is experiencing only mild symptoms.

21. As noted at the outset, no vaccine exists for the coronavirus and no cure exists for COVID-19.

V. Measures to mitigate the spread of the disease

22. The measures recommended by leading infectious disease experts to mitigate the spread of COVID-19 have been widely reported and have entered our daily lexicon.

23. The CDC recommends that all persons wash their hands often, that they clean and disinfect frequently used surfaces in their home daily, and that they avoid touching their eyes, nose, and mouth to the greatest extent possible. The CDC also recommends that persons take “social distancing” measures, whereby they remain out of congregate settings, avoid mass gatherings, and maintain distance—at least six feet—from other

persons in order to limit the ability of the coronavirus to spread. To implement these strategies, hundreds of millions of Americans have been ordered to do what seemed unthinkable only a few weeks ago: to refrain from going to work, school, or even small social gatherings, and to leave their homes only when it is essential to do so. These so-called “shelter-in-place” orders have been issued now in at least 26 states, 66 counties, 14 cities, and one territory. *See Sarah Mervosh, et al., See Which States and Cities Have Told Residents to Stay at Home*, N.Y. Times, at <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html> (last updated Mar. 28, 2020).

24. On March 23, 2020, Governor Holcomb issued a statewide executive order in Indiana, which generally requires all Hoosiers to remain at home to the greatest extent possible. *See Executive Order 20-08, available at* https://www.in.gov/gov/files/Executive_Order_20-08_Stay_at_Home.pdf (Mar. 23, 2020). As noted, this Court has also recognized the extraordinary health emergency facing Hoosiers, and the need to shelter-in-place and keep socially distant by declaring an emergency and by tolling all time limits for appellate filings, by suspending rules regarding filing by personal delivery, and by tolling numerous other deadlines. *See In re Administrative Rule 17 Emergency Relief for Indiana Trial Courts Relating to 2019 Novel Coronavirus (COVID-19)*, --N.E.3d--, No. 20S-CB-123, 2020 WL 1329684 (Ind. Mar. 23, 2020); *see also Order, In re Administrative Rule 17 Emergency Relief for Indiana Trial Courts Relating to 2019 Novel Coronavirus (COVID-19)*, --

N.E.3d--, No. 20S-CB-123, *available at* <https://www.in.gov/judiciary/files/order-other-2020-20S-CB-123b.pdf> (Ind. Mar. 25, 2020) (establishing deadlines for appellate filings).

25. Unfortunately, the CDC's recommendations for limiting the spread of COVID-19 are virtually impossible to implement in an institutionalized setting, where many of the most fragile individuals reside. Social distancing is impossible in Indiana's jails and prisons, for persons reside in close quarters and in frequent contact with each other and with their jailers. Maintaining proper hygiene is likewise challenging at best, for limited resources, supplies, and staff make it virtually impossible for persons to wash their hands regularly or to disinfect all frequently touched surfaces. Conditions, in other words, are ripe for a widespread outbreak. *See, e.g.,* Omar Jimenez, *America's largest single site jail is home to a new coronavirus cluster*, CNN.com, Mar. 29, 2020, *at* <https://www.cnn.com/2020/03/29/us/detroit-coronavirus-cook-county-jail/index.html> (describing an outbreak of COVID-19 at the Cook County Jail in Chicago); Tim Evans, *Coronavirus catastrophe feared in Indiana's jails and prisons, some call for bold steps ("Coronavirus catastrophe")*, Indianapolis Star, Mar. 25, 2020, *at* <https://www.indystar.com/story/news/investigations/2020/03/25/indiana-coronavirus-covid-19-what-jails-prisons-doing/2900441001/>.

26. These problems, of course, are exacerbated by all-too-common population pressures experienced by Indiana's jails. A recent task force on jail overcrowding in Indiana chaired by Justice David concluded that "many counties are experiencing jail overcrowding." Jail Overcrowding Task Force, *2019 Report*, at 5, *available at*

<https://www.in.gov/judiciary/iocs/files/jail-overcrowding-report.pdf>. The Indiana Criminal Justice Institute has thus previously concluded that 77% of Indiana jails were either overcrowded or at capacity. See Dustin Grove, *Indiana criminal justice leaders looking to curb jail overcrowding*, WTHR.com, Nov. 7, 2019, at <https://www.wthr.com/article/indiana-criminal-justice-leaders-looking-curb-jail-overcrowding>.

27. To their immense credit, it is the understanding of undersigned counsel that many (but not all) counties in Indiana have already taken steps to reduce their jail population, and that the DOC has expressed a willingness to promptly implement any sentencing modifications or other judicial orders that it receives. But time is of the essence: employees at two Indianapolis-area jails—at least—have already tested positive for COVID-19, see *Coronavirus catastrophe, supra*; Shakkira Harris, *Confirmed case of COVID-19 at Hancock County Sheriff's Department*, The Indy Channel, Mar. 12, 2020, at <https://www.theindychannel.com/coronavirus/confirmed-case-of-covid-19-at-hancock-county-sheriffs-department>, and anecdotal reports indicates that persons in other facilities are demonstrating symptoms consistent with COVID-19 although limited testing capabilities make confirmation impossible.

VI. The United States Constitution requires that the health and safety of Indiana prisoners be protected amidst the current epidemic, and Indiana law provides several mechanisms for doing so

28. Ensuring the safety of at-risk persons in Indiana’s jails and prisons is not only a humanitarian necessity; it is a constitutional requirement. After all, the Eighth Amendment to the United States Constitution prohibits state officials from acting with deliberate indifference to a convicted prisoner’s serious medical needs. *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 828-29 (1994); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). At least three federal circuits, including the Seventh Circuit, have concluded that officials violate the Fourteenth Amendment rights of pretrial detainees—who have not been convicted of a crime—simply by subjecting persons to an objectively unreasonable risk of harm, without resort to the subjective component of Eighth Amendment analysis. *See Miranda v. County of Lake*, 900 F.3d 335, 350-52 (describing circuit split). Regardless, where the risk of harm is clear and recognized, the subjective component of Eighth Amendment analysis is met and these standards merge. Moreover, an incarcerated individual need not demonstrate with certainty that harm will befall him or her; the Constitution does not tolerate the exposure to environmental hazards that create even a significant risk of serious injury. *See, e.g., Helling v. McKinney*, 509 U.S. 25, 32-35 (1993). Cases concluding that this standard is satisfied by hazards considerably less dangerous than COVID-19 are legion.²

² *See, e.g., Helling*, 509 U.S. at 28-29 (exposure to tobacco smoke); *Hinojosa v. Livingston*, 807 F.3d 657, 669 (5th Cir. 2015) (“extremely dangerous temperatures”); *Johnson v. Epps*, 479 Fed. App’x 583, 590-91 (5th Cir. 2012) (exposure to unsterilized barbering instruments potentially contaminated with HIV-positive blood); *Powers v. Snyder*, 484 F.3d 929, 931 (7th Cir. 2007) (exposure to hepatitis or other serious diseases); *Vinning-El v. Long*, 482 F.3d 923, 924 (7th Cir.

29. The circumstances of this petition, of course, are atypical: it is the institutional environment *itself* that creates an unconscionable risk to inmates' health and safety. But Indiana law provides numerous mechanisms through which at-risk persons may obtain temporary or permanent release in order to ensure their well-being and the well-being of those required to interact with them inside the institution. Trial courts, of course, may alter or waive a pretrial detainee's bail requirement at any time. *See* Ind. Code § 35-33-8-5; *see also* Ind. R. Crim. P. 26(A) (providing that, with certain exceptions, an arrestee should be released "without money bail or surety subject to such restrictions as determined by the court" whenever he or she "does not present a substantial risk of flight or danger to self or others"). Even for convicted prisoners, the DOC has discretionary authority to arrange for an offender's placement outside of DOC facilities whenever it "determines that a committed offender is mentally or physically incapacitated to such an

2007) (flooding or exposure to blood and feces in cells); *Morgan v. Morgensen*, 465 F.3d 1041, 1047 (9th Cir. 2006) (a "safety hazard in an occupational area"); *Atkinson v. Taylor*, 316 F.3d 257, 266-69 (3d Cir. 2003) (exposure to tobacco smoke); *DeSpain v. Uphoff*, 264 F.3d 965, 977-79 (10th Cir. 2001) (cells flooded with sewage); *Shannon v. Graves*, 257 F.3d 1164, 1168 (10th Cir. 2001) (exposure to human waste); *Herman v. Holiday*, 238 F.3d 660, 664 (5th Cir. 2001) (exposure to "unreasonably high levels of environmental toxins"); *Loftin v. Dalessandri*, 3 Fed. App'x 658, 660-63 (10th Cir. 2001) (exposure to tuberculosis); *Warren v. Keane*, 196 F.3d 330, 332-33 (2d Cir. 1999) (exposure to both second-hand smoke and asbestos); *LaBounty v. Coughlin*, 137 F.3d 68, 74 (2d Cir. 1998) (exposure to "friable asbestos"); *Smith v. Copeland*, 87 F.3d 265, 268 (8th Cir. 1996) (exposure to raw sewage); *Keenan v. Hall*, 83 F.3d 1083, 1089-90 (9th Cir. 1996) (deprivation of outdoor exercise, excessive noise and lighting, lack of ventilation, inadequate access to basic hygiene supplies, and inadequate food and water); *Wallis v. Baldwin*, 70 F.3d 1074, 1076-77 (9th Cir. 1995) (exposure to asbestos); *Kelley v. Borg*, 60 F.3d 664, 666-67 (9th Cir. 1995) (unidentified "fumes" which rendered an inmate unconscious); *Henderson v. DeRobertis*, 940 F.2d 1055, 1059 (7th Cir. 1991) (inadequate heat and shelter); *DeGidio v. Pung*, 920 F.2d 525, 531-33 (8th Cir. 1990) (exposure to tuberculosis); *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980) (inadequate heat).

extent that proper custody, care, and control cannot be provided by the [DOC]" – authority that is surely broad enough to permit at-risk offenders to be temporarily placed on home detention or in a similar setting. *See* Ind. Code § 11-10-1-3(c); *see also* Ind. Code § 11-10-2-5(b) (juvenile offenders). And, of course, trial courts may modify some individuals' sentences under certain circumstances. *See* Ind. Code § 35-38-1-17.

30. Although extraordinary, this petition is not unique: faced with the threat posed by COVID-19 and recognizing that the institutional environment renders impossible the full implementation of the guidelines recommended by the CDC and other experts for limiting the spread of the disease, several state courts have already taken action to temporarily depopulate their states' prisons and jail.

31. For instance, on March 22, 2020, the Supreme Court of New Jersey issued a consent order requiring the release of inmates from county jails who met certain charging and/or conviction criteria, amounting to an immediate reduction of approximately ten percent of New Jersey's county jail population. *Supreme Court of New Jersey*, Docket No. 084230 (Mar. 22, 2020). On March 16, 2020, the Chief Justice of the Supreme Court of South Carolina issued a memorandum directing municipal court judges to release non-capital pre-trial detainees without bond, unless such persons pose an unreasonable risk of flight or of harm to the community. *See* Memorandum of March 16, 2020, *available at* <https://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2461>. And the Maine judiciary issued an emergency order vacating all outstanding warrants for unpaid

finer and for failure to appear, in an attempt to minimize further arrests. See Emergency Order of March 16, 2020, available at <https://www.courts.maine.gov/covid19/emergency-order-vacating-warrants-fines-fees.pdf>. State and local court judges around the country in Alabama, California, Florida, Maine, Montana, Ohio, Texas, and Washington D.C., among others, have taken steps to reduce county jail populations.

VII. This Court should immediately issue an emergency rule directing trial courts to take steps to identify imprisoned pretrial detainees and incarcerated persons from their courts who may, consistent with Indiana law, be released to home detention

32. As noted above, Indiana trial courts have tools at their disposal to determine if both pretrial detainees and convicted incarcerated persons should be released from incarceration. And, as indicated, the DOC possesses statutory authority to “make arrangements for placement outside the department” for convicted offenders who cannot be safely housed within the DOC because of physical incapacity. Ind. Code § 11-10-1-3(d).

33. The ACLU of Indiana wishes to stress that it is not faulting the DOC, Indiana’s trial courts, or any other persons or entities concerning their responses to the COVID-19 crisis and the particular risk the disease poses to incarcerated persons. To the contrary, it appears that all relevant persons and entities recognize the risks created by the extraordinary circumstances confronting the world. However, this Court must utilize its supervisory authority over the trial courts of this State and advance the duty that courts have to “protect the constitutional rights of citizens,” *Kokenes v. State*, 213 Ind. 476, 491, 13 N.E.2d 524, 530 (1938), to order all trial courts in Indiana with criminal jurisdiction to

immediately take steps to determine if incarcerated pretrial detainees and convicted persons may be safely released from county jails and DOC facilities so they may benefit from the social isolation and the shelter-in-place protocols recommended by all authorities.

34. Specifically, this Court should request the Indiana Department of Correction and each county sheriff to:

a. Immediately compile a list of all prisoners under their control who are at heightened risk for severe illness or death from COVID-19 because they are 65 or older or have the following high-risk conditions:

- chronic lung disease or moderate to severe asthma
- serious heart conditions
- compromised immune systems for any reason, including cancer treatment, bone marrow or organ transplantation, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune weakening medications
- severe obesity (body mass index ≥ 40)
- uncontrolled medical conditions such as diabetes, renal failure or liver disease

See Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), People who are at higher risk for severe illness, at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>.

b. Immediately compile a list of pretrial detainees who are currently being held based on:

- Non-violent misdemeanor charges;
- Non-violent felony charges that would be eligible for a probationary, home detention, or work-release sentence if a conviction were secured;
- The inability to pay an imposed money bond, where a court has made the judicial determination that the individual is bailable;

- Arrest for an allegation of violation of parole or probation, where the violation does not constitute a separate, violent offense.

c. Immediately compile a list of convicted prisoners who are within 6 months of their expected release date.

d. Transmit this list to the Indiana court which committed the prisoner to the particular jail or prison along with any recommendation as to whether, in the opinion of the penal institution or Sheriff, the prisoner merits consideration for release, either temporary or permanent, given the COVID-19 pandemic.

35. This Court should order each court receiving the above list of prisoners compiled by the Sheriff to immediately determine:

a. In the case of pretrial detainees, whether bail requirements should be waived pursuant to Indiana law so that the person may shelter at home.

b. In the case of convicted persons, whether a sentence reduction or suspension is warranted under Indiana law so the person may shelter at home.

36. Independent of the list created by the local sheriff, this Court should order each court with criminal jurisdiction to immediately review its docket and ascertain which prisoners have had a bail amount established but who remain incarcerated solely because they have not paid bail. Each court may coordinate its efforts with the office of the county sheriff to obtain all names as quickly as possible. So that they may be sheltered at home, the court should then at once determine if the prisoners can be released on their own recognizance or through a substantial reduction in their bail to an amount that the court determines the individual capable of paying without undue hardship.

37. To the extent that the procedure for reduction or sentence suspension under Indiana Code § 35-38-1-7 is utilized, this Court should further order that if notice to the

prosecutor and victim is necessary, it be given electronically or telephonically so that the trial court can issue a decision in the most expeditious manner possible.

38. This Court should further order trial courts to take all actions necessary and appropriate in their discretion to attempt to reduce in the future the number of persons committed to jails as pretrial detainees so they may shelter at home.

39. This Court should further order trial courts to consider all other available options to determine if they should exercise their lawful discretion to reduce the sentences of prisoners so they may be released to shelter at home.

40. This Court should request that the Indiana Department of Correction have the Indiana Parole Board advance parole considerations to the greatest extent possible to place prisoners who merit parole at this time on parole so they may shelter at home, and should further request that the Indiana Department of Correction review whether any at-risk prisoners are appropriate for temporary release pursuant its authority under Indiana Code § 11-10-1-3(c) (adult offenders) or Indiana Code § 11-10-2-5(b) (juvenile offenders).

41. The ACLU of Indiana, of course, recognizes that even these steps will not eliminate the danger that the COVID-19 pandemic poses for Indiana's prisons or jails, nor will it ensure the safety of all at-risk persons. However, ensuring that a critical mass of prisoners are removed to a safe environment will inure to the benefit of all inmates and their jailers, for relieving population pressures will assist prisoners and staff in complying

with the CDC's hygienic guidelines and its guidelines for social distancing to the greatest extent possible.

VIII. Conclusion

42. We live in extraordinary times. The adversary here is not a defendant; it is a disease that, at least at this point, appears relentless. The only way of hoping to stop the deadly spread of the disease is for all of us to practice social distancing and sanitary techniques—measures that cannot be meaningfully achieved by Indiana's prisoners. If the jails and prisons can be depopulated it will benefit not just the prisoners themselves, but those who still work there and who return to their families and communities at the end of every day. This unprecedented emergency calls for emergency measures by this Court and the ACLU requests that this Court consider this petition and grant all appropriate relief as necessary to help stem the progression of the disease.

WHEREFORE, the ACLU of Indiana respectfully submits its petition for emergency rulemaking, and requests the issuance of all appropriate relief.

/s/ Kenneth J. Falk

Kenneth J. Falk
No. 6777-49

/s/ Gavin M. Rose

Gavin M. Rose
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/s/ Stevie J. Pactor

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CERTIFICATE OF SERVICE

A copy of this petition has been served on this date, March 30, 2020, on the following persons and entities. Because of the emergent nature of this petition, and the fact that many persons are working remotely, this petition is being served by e-mail only.

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