

March 30, 2020

The Honorable Ralph Northam
Governor, Commonwealth of Virginia
1111 East Broad Street
Richmond, VA 23219

Dear Governor Northam:

We acknowledge and appreciate your leadership to slow the spread of the COVID-19 virus in the Commonwealth. In particular, we applaud your initial effort to encourage local criminal justice officials, including Commonwealth's attorneys, defense attorneys, sheriffs, and other jail officials, to enact proactive measures to combat the spread of the virus in our jails, prisons, and detention facilities. While some officials are moving quickly to release people who are in custody unnecessarily, many others are faltering or putting up barriers.¹ As a result, the risk of a public health catastrophe for people and staff in custodial facilities throughout the Commonwealth remains unmitigated.



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Enclosed with this letter is a draft of an Executive Guidance document that we believe would, if issued by you, rapidly address many of these risks. A decisive, swift, coordinated, and uniform statewide response by all stakeholders in the criminal legal system is needed to save lives and protect incarcerated people, staff, and the public at large from the threats posed by COVID-19.

There is strong public support for dramatically reducing jail and prison populations to slow the spread of COVID-19. Sixty-six percent of likely voters, including 59% of those who identify as "very conservative," said that elected officials should be considering measures to reduce populations in prisons and jails as a response to coronavirus.²

One of the biggest impediments to an effective response thus far is the fact that our state's criminal legal system is decentralized and made up of dozens of agencies and thousands of individual decision makers. When each of these

¹ See Ned Oliver, *Some Virginia cities are pushing to clear jails of nonviolent offenders. Others? Not so much*, VIRGINIA MERCURY, March 26, 2020, <https://www.virginiamercury.com/2020/03/26/some-virginia-cities-are-pushing-to-clear-jails-of-nonviolent-offenders-others-not-so-much/>; Brad Zinn, *Expert: Middle River Regional Jail is vulnerable to COVID-19 outbreak*, NEWS LEADER, March 27, 2020, <https://www.newsleader.com/story/news/local/2020/03/27/middle-river-regional-jail-has-shed-nearly-100-inmates-combat-virus/2919154001/>.

² *Fighting the Coronavirus with Decarceration: Policies and Polling*, Data for Progress, March 2020, <https://www.dataforprogress.org/memos/fighting-coronavirus-with-decarceration> (March 16, 2020 to March 17, 2020, survey of 2509 likely voters. The margin of error is ± 1.9 percent).

stakeholders – from police and prosecutors to judges, Sheriffs, and supervisors – implement responses to this public health crisis in an inconsistent or case-by-case fashion, it inevitably leads to delay, confusion, misallocation of resources, and – most importantly – preventable deaths. It also allows Virginians in different localities to experience the criminal legal system differently just because of where they live.

Infections and deaths will likely disproportionately impact people of color, who are overrepresented in jails and prisons. Black people make up 19% of Virginia’s population but 58% of the population of incarcerated people. Moreover, as you know as a doctor, people of color are also disproportionately represented among vulnerable populations with diabetes, heart disease, respiratory disease, and other conditions with COVID-19 comorbidity.

You are in the unique position to lead a coordinated and uniform statewide response that brings multiple system actors together by offering clarity, consistency, and vision, with a plan rooted in guidance from public health experts and informed by the racial disparities rampant across our criminal legal and healthcare systems. There are three steps you could take right now to address the pandemic and limit the spread of COVID-19 among some of our most vulnerable communities:

1. **Reduce vulnerable and overall populations in local custodial facilities.** Adopt and execute the enclosed Guidance to provide clear direction to local stakeholders, including police, prosecutors, and judges overseeing criminal matters, to take all possible steps to reduce the intake of people into state and local custodial settings or other carceral environments. This includes guidance on issuing summonses for most all misdemeanors and reducing custodial arrests for other offenses, temporarily suspending the use of cash bail to hold people pretrial, eliminating detention for civil violations of law, limiting pretrial detention except where a person’s release presents an imminent threat of harm to a specific person or people, and setting conditions of release that allow people the freedom to seek medical help or care for themselves or a loved one who has COVID-19.
2. **Release vulnerable people in state custodial facilities.** Use your clemency powers under Va. Const. art. V § 12 to begin a process of immediate release of all people identified by the Centers for Disease Control and Prevention (CDC) as particularly at-risk – older people and people with underlying health conditions or who are otherwise immune-compromised – whose sentences would end in the next two years, anyway.
3. **Reduce overall population in state custodial facilities.** Using those same powers, begin a process of immediate release for anyone whose sentence would end in the next year, anyway. Carceral facilities make social



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distancing impossible and are not built or prepared to fulfill the medical needs associated with COVID-19.

The time for action is now. This pandemic is here, and it will – if it hasn't already – make its way into our custodial facilities. We ask you to adopt and execute immediately the Executive Guidance document enclosed with this letter to address this crisis head-on. Thank you for your immediate attention to this matter.

Very truly yours,

ACLU

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Enc. Executive Guidance to Counties, Municipalities, Law Enforcement
Agencies, Judicial Officers, Custodial Facilities, and the Virginia
Parole Board

EXECUTIVE GUIDANCE

TO COUNTIES, MUNICIPALITIES, LAW ENFORCEMENT AGENCIES, JUDICIAL OFFICERS, CUSTODIAL FACILITIES, THE VIRGINIA DEPARTMENT OF CORRECTIONS, AND THE VIRGINIA PAROLE BOARD

On March 12, 2020, my office issued Executive Order 51 which declared a state of emergency in the Commonwealth of Virginia to prepare for and coordinate our response to the spread of COVID-19 (“the virus”). The virus remains an urgent threat to public safety and welfare, and immediate efforts to control the spread of the virus, reduce and minimize the impacts of contamination, and otherwise mitigate the effect of the virus are needed.

An outbreak of the virus in the Commonwealth’s jails, prisons, juvenile detention facilities and other mandatory residential institutions (“custodial facilities”) risks the rapid transmission of the COVID-19 virus, will significantly prolong the time needed to bring the virus under control, would overwhelm existing medical capacity inside custodial facilities, and would be potentially catastrophic for the people incarcerated in state correctional facilities who disproportionately include populations the Centers for Disease Control and Prevention (CDC) has identified at increased risk of morbidity and mortality from COVID-19.¹

Virginia’s dedicated law enforcement and correctional officers and other staff protecting our communities and working in custodial facilities deserve the utmost protection from exposure to the virus. The reduced intake of people into custodial facilities is necessary and consistent with the prior orders and guidance of my office and this Commonwealth for people to engage in social distancing, self-isolation and individual quarantine. As such, close coordination and alignment between and among the many various law enforcement, judicial and correctional agencies of the Commonwealth is essential to ensure an effective system-wide response in custodial facilities that controls the spread of the virus.

At this time, I find it necessary to issue this Executive Guidance to counties, municipalities, all law enforcement agencies, judicial officers, custodial facilities, the Virginia Department of Corrections, and the Virginia Parole Board to assure a coordinated statewide response to these important public safety and public health issues and to do all that is possible to limit the spread of COVID-19.

FINDINGS

1. On March 7, 2020, the Virginia Department of Health confirmed the first presumptive case of COVID-19. Since then, the number of confirmed cases has continued to climb, and we have evidence of community spread throughout the Commonwealth. COVID-19 is a respiratory illness, and like other respiratory illnesses, it is transmitted through person-to-

¹ See Centers for Disease Control and Prevention (CDC), Coronavirus Disease 2019 (COVID-19), People Who Are at Higher Risk for Severe Illness, <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/people-at-higher-risk.html>.

person contact or by contact with surfaces contaminated with the virus. Persons infected with COVID-19 may become symptomatic anywhere from two (2) to fourteen (14) days after exposure. Symptoms may be mild, like those of a common cold, or more severe, similar to the flu, including any combination of cough, body aches, fatigue, chest tightness, or fever. Some people may not develop a fever, or a fever may not appear until several days into the illness. Others may first learn they have the virus when they lose their sense of smell or taste.

2. A significant number of Virginians are at risk of serious health complications, including death, due to COVID-19. In particular, individuals with serious chronic health conditions like diabetes, high blood pressure, and lung disease, among others, and especially older adults, are thought to be most at risk for becoming very ill with or dying from this virus. Persons with mild symptoms and asymptomatic COVID-19 illness may place other vulnerable members of the public at significant risk. A large surge in the number of persons with serious infections can compromise the ability of the healthcare system to deliver necessary health care to the public, including some with non-COVID-19 related life-threatening conditions.
3. My administration, along with other State, local, and federal authorities, has taken a wide array of actions to mitigate the effects of the pandemic, prevent further spread, and protect against overwhelming our health care resources. It is now clear that more is required if we are to stem the further spread of this disease.
4. The CDC recommends community mitigation strategies, such as social distancing measures to limit spread of the virus. One area of concern for possible transmission is when large numbers of people gather. The CDC has issued guidance concerning the factors to consider for mass gatherings, and the White House has recommended limiting mass gatherings to no more than ten (10) persons. On March 23, 2020, my office issued Executive Order 53, which prohibits “all public and private in person gatherings of 10 or more individuals.”

GUIDANCE

I am providing the following additional guidance for counties, municipalities, all law enforcement agencies, judicial officers, custodial facilities, the Virginia Department of Corrections, and the Virginia Parole Board concerning efforts to mitigate the spread of COVID-19 among custodial facilities in the Commonwealth.

Guidance to Law Enforcement Agencies and Judicial Officers

1. State and local law enforcement agencies “shall” order all officers to issue a summons as required by Va. Code § 19.2-74 and release anyone they observe committing a misdemeanor unless the person clearly presents an imminent and serious risk of bodily

harm to another person. Except when required by statute, officers should be instructed to cease making custodial arrests unless necessary to prevent an imminent and serious risk of bodily harm to another person. Law enforcement should work with magistrates and judges to extend the return date on summonses to minimize contact with jails and courthouses.

2. Law enforcement should not make a custodial arrest of any person solely on an outstanding warrant for failing to appear for a court date or failing to pay a fine or fee related to a conviction or for status-based or technical parole violations or any civil violation of state or federal law.
3. In cases that proceed by indictment, information or complaint, judges, prosecutors, and law enforcement should issue a summons instead of a warrant where there is no imminent and serious risk of bodily harm to another person, except where otherwise required by Virginia statute.
4. Judges, prosecutors, and law enforcement should work together to develop procedures that allow law enforcement officers to issue a summons instead of effectuating an arrest in cases that have been initiated by indictment, information or complaint and a warrant has already been issued where there is no imminent and serious risk of bodily harm to another person, except where otherwise required by Virginia statute.
5. Judges, prosecutors, and law enforcement should take all steps possible to reduce the intake of people into state and local custodial facilities, including release on recognizance for all non-felony offenses, and for felony offenses setting conditions of pre-trial release that will not require any custodial detention, nor any in-person contact for community supervision, unless custodial detention is determined to be absolutely necessary to avoid an imminent and serious risk of bodily harm to another person.
6. Judges should establish judicial review and release processes for individuals in local custodial facilities where courts have suspended criminal processes, and adopt sentence modifications, as outlined in Va. Code § 19.2-303, to reduce the population of custodial facilities.
7. Judges should vacate existing failure to appear, failure to pay, and any similar warrants for non-criminal or technical violations and should not issue any new such warrants during the period when the March 12, 2020 Emergency Declaration, Executive Order 51, or any extension thereof, is in place.
8. Judges, prosecutors, and law enforcement are encouraged to implement any other pretrial diversion and release methods to lower the number of individuals held in custody at any given time, including using alternatives to incarceration.

9. Through the performance of their duties, law enforcement should be aware of and weigh the severity of the violation when a suspect has any flu-like symptoms, including but not limited to any combination of fever, cough, body aches, fatigue, chest tightness, shortness of breath, or loss of sense of smell or taste (collectively, COVID-19 Symptoms), as well as the risk posed by continuing to remain in contact with the suspect or placing the suspect in contact with others.
10. When contacting members of the public who appear to be visibly ill or have COVID-19 Symptoms and if the contact is for a violation unlikely to result in imminent and serious risk of bodily harm to another person, law enforcement should consider:
 - a. Adhering to the Commonwealth’s social distancing directives;
 - b. Limiting the amount of time they are exposed to the suspect;
 - c. Documenting the suspect’s name and date of birth on their notepad, rather than exchanging documents through hand-to-hand contact; and
 - d. Allowing the suspect to proceed with a verbal warning, when appropriate, so as to limit the time of the contact and potential exposure risk.
11. When contacting members of the public who appear to be visibly ill or have COVID-19 Symptoms, and the violation is serious in nature such that there is imminent and serious risk of bodily harm to another person, law enforcement should fully engage with the suspect to uphold the law. In these situations, law enforcement should consider:
 - a. Donning personal protective equipment (PPE);
 - b. Putting a surgical mask on an arrestee to limit potential virus exposure and transmission risk;
 - c. Practicing personal hygiene, including hand washing and applying hand sanitizer, to protect against transmission;
 - d. Removing for immediate laundry the uniform/clothing worn; and
 - e. Cleaning and disinfecting duty belt and gear prior to reuse using a household cleaning spray or wipe according to the product label.

Guidance to All Custodial Facilities

1. All county and municipal governments, sheriffs, and authorities (“local jurisdictions”) that operate custodial facilities (directly or contract with another entity to do so) should take immediate steps to significantly reduce the population in local custodial facilities. Such steps should include:
 - a. Reducing intake into local custodial facilities by primarily responding to legal violations through warnings, summonses, and citations, and cease making custodial arrests unless necessary to prevent an imminent and serious risk of bodily harm to another person, as detailed in the Guidance to Law Enforcement Agencies above;
 - b. Reducing the population of local custodial facilities by working in cooperation with judicial officers to release all individuals held only on cash bail, any individual detained solely on a detainer for a civil violation, any individual held on an outside

- agency's detainer for a criminal violation other than for a violent felony, and individuals within six (6) months of completing a post-conviction sentence;
- c. Suspending contracts with U.S. Immigration and Customs Enforcement to provide civil immigration detention bed space; and
 - d. Any and all other steps deemed necessary and effective by local jurisdictions to reduce daily intake and the overall population of local custodial facilities.
2. State and local custodial facilities should ensure all individuals held in custody are held in a manner that allows social distancing to the maximum extent possible, including through changes in how individuals are housed or reductions in facility populations. "Social Distancing" means maintaining at least a six (6) foot distance from other individuals, washing hands with soap and water for at least twenty (20) seconds as frequently as possible, covering coughs or sneezes (into the sleeve or elbow, not hands), regularly cleaning high-touch surfaces, and not shaking hands or making other physical contact between individuals. The foregoing guidance may need to account for facility design and other physical, public safety, or law enforcement constraints.
 3. In addition to Social Distancing, all custodial facilities should take all reasonable steps to ensure that not more than ten (10) individuals are gathered at the same time in any confined indoor or outdoor space including, for example, day rooms, booking areas, housing unit common areas, cafeterias, medicine lines, libraries, or visitation areas. In any situation where it is not possible to adhere to the ten (10) person guideline, facilities should still follow Social Distancing guidelines and space individuals at least six (6) feet from one another. In connection with this guidance, facilities should ensure that there is not a cumulative presence of ten (10) or more people in the same confined space between cleanings of those spaces to the greatest extent practicable. For example, when reasonable, before any new group of people enters a confined space such as a booking area, the contact surfaces of that booking area should be cleaned and disinfected so as to ensure that the cumulative contacts in that space do not exceed that of ten (10) or more individuals.
 4. All custodial facilities should develop and publicly announce a plan to disinfect and regularly sanitize all accommodations, with most frequent disinfectant cleaning of contact surfaces where staff, contractors, individuals in custody, or permitted visitors are present. Such cleaning protocols should include sanitizing phone and video screens, gym equipment, common toilet facilities, and other similar high-use equipment between uses.
 5. All custodial facilities should ensure each individual admitted to and released from any facility: is screened for COVID-19 Symptoms; receives a temperature check; provides a recent medical history; provides relevant health information; and is able to access, as necessary, appropriate safety equipment, such as gloves and surgical masks.
 6. All custodial facilities should ensure all staff, contractors, and visitors entering and exiting all facilities are screened for potential COVID-19 Symptoms and receive a temperature

check. Facilities should provide clear communication that absence of symptoms does not rule out COVID-19 infection or the risk of transmission and ensure that Social Distancing is maintained.

7. In settings where group gatherings occur, all custodial facility staff should, where possible, follow Social Distancing, and in particular keeping six (6) feet of separation between individuals, such as at roll call or other gatherings, considering facility design and safety. Staff should also consider the use of video conference or other technologies to avoid physical in-person meetings.
8. All custodial facilities should ensure that all individuals in custody who are exhibiting COVID-19 Symptoms are isolated from the general population, as facility design or safety permits, and provided with necessary health care, utilizing telemedicine services when possible. Individuals in custody placed in isolation as a result of COVID-19 containment or treatment should not receive punitive measures and should have ample access to comfort, entertainment, and activity-related materials allowed by their custody level. Staff should establish protocols for regular check-ins with all individuals in custody who are experiencing COVID-19 Symptoms and ensure they have access to expeditious medical care, including immediate attention if symptoms worsen. If an individual in custody requests a visit to the infirmary for a health check, such request should be granted, and the individual in custody should be provided with a surgical mask while transiting through other areas of the facility and adhere to Social Distancing.
9. All custodial facilities should ensure that staff or outside contractors who are exhibiting COVID-19 Symptoms are barred entry to all facilities and are directed to self-isolate. Under no circumstances should someone exhibiting COVID-19 Symptoms have interaction with those being held in custody. This also applies to staff or outside contractors who have known contact with third-party individuals outside the facility who are exhibiting COVID-19 Symptoms.
10. All custodial facilities should ensure that all individuals held in custody have access to personal hygiene products, including soap, taking into account, as appropriate, concerns related to facility safety. Facilities should provide free personal hygiene products, such as soap or hand sanitizer, to ensure each individual has access to necessary supplies and is able to comply with health officials' recommendations.
11. All custodial facilities should temporarily suspend all visitation to the facilities, including family visits and volunteer visits, except for those providing legal representation, and make accommodations for free phone or video conference calls. The jurisdiction should ensure that all attorneys exhibiting COVID-19 Symptoms do not interact with those individuals held in custody. Facilities should provide free personal hygiene products, such as soap and hand sanitizer, to attorneys before and after their visitation with those individuals held in custody.

12. For legal representation, all facilities should increase the availability of confidential phone or video calls to reduce the number of in-person visits. Any attorney-client calls must be free of charge. Costs for other calls should be eliminated or minimized to the greatest extent possible.
13. All custodial facilities should ensure that all staff, outside contractors, and individuals held in custody are educated on Social Distancing and best personal hygiene practices, such as proper handwashing and coughing into their elbows.
14. All custodial facilities should ensure that the local public health agency is notified of any and all suspected or confirmed cases of COVID-19 that occur within a facility.
15. All custodial facilities should ensure that individuals in custody are not routinely transferred from facility to facility within a jurisdiction or between jurisdictions while the March 12, 2020 Emergency Declaration, Executive Order 51, or any extension of thereof, is in place unless necessary to address overcrowding that limits the ability to implement social distancing or to provide access to necessary medical or mental health care that cannot safely be delayed.

Guidance to the Virginia Department of Corrections and the Virginia Parole Board

1. Pursuant to my powers under Va. Const. art. V § 12, my office will grant expedited review of the individuals, described below, to immediately reduce the overall population in state custodial facilities and discharge individuals particularly vulnerable to mortality from COVID-19.
 - a. The Virginia Department of Corrections (DOC) should immediately identify for my office all persons held in a state correctional facility who currently have 365 days or less of incarceration left to serve as of the date of this Guidance, for the purpose of granting immediate commutation of the remainder of these individuals' carceral term.
 - b. The DOC should also immediately identify for my office all persons held in a state correctional facility who currently have two (2) years or less of incarceration left to serve as of the date of this Guidance, and who also meet one or more of the following conditions: (1) 60 years of age or older; (2) chronic respiratory disease; (3) cancer; (4) heart disease; (5) lung disease; (6) diabetes; or (7) who are otherwise immune-compromised ("vulnerable population"), for the purpose of granting an expedited review and presumptive grant commuting the remainder of their carceral term, unless my office determines commutation of a particular individual would pose an immediate and direct threat to public safety.

2. The Virginia Parole Board should review its existing records to identify and order the immediate release on parole of every person currently held in a state correctional facility who (1) is currently eligible for either discretionary or geriatric parole; (2) has been identified through the COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) tool as being at low risk for violent recidivism; and (3) has, or had at the time of their last parole review, a viable home plan, unless the Virginia Parole Board determines that the parole of a particular individual would pose an immediate and serious threat to public safety. For those individuals who meet these criteria but do not yet have a viable home plan in place, the Parole Board and DOC must expedite planning, and where family placements are not available, work with community organizations to ensure that the residential needs of anyone otherwise eligible for release are met and the person is released as soon as possible.

3. For all people under parole supervision, for the duration of the March 12, 2020 Emergency Declaration, Executive Order 51, or any extension thereof, the Department of Corrections Probation and Parole services should (1) cease all in-person check-ins or allow check-ins to occur by voice or video call; (2) suspend enforcement of any mobility-restricting supervision conditions that impede a person's ability to seek medical care or to support a dependent; and (3) suspend all issuance of detainers or other revocations that would result in incarceration for technical (crimeless) rule violations.

We will continue to work with counties, municipalities, all law enforcement agencies, judicial officers, all custodial facilities, the Department of Corrections, and the Parole Board as the COVID-19 situation continues to develop. As Virginians, we are all in this together and I am grateful for your service to our state and our communities.

GIVEN under my hand this
_____ day of _____, 2020.

Ralph Northam
Governor