

March 19, 2019

Hon. Idee Fox
President Judge
First Judicial District
Philadelphia, PA 19107
Via email to: Idee.Fox@courts.phila.gov

Hon. Patrick Dugan
President Judge
Philadelphia Municipal Court
Philadelphia, PA 19107
Via email to: Patrick.Dugan@courts.phila.gov

Hon. Leon Tucker
Supervising Judge
First Judicial District
Philadelphia, PA 19107
Via email to: Leon.Tucker@courts.phila.gov



Eastern Region Office
PO Box 60173
Philadelphia, PA 19102
215-592-1513 T
267-573-3054 F

Central Region Office
PO Box 11761
Harrisburg, PA 17108
717-238-2258 T
717-236-6895 F

Western Region Office
PO Box 23058
Pittsburgh, PA 15222
412-681-7736 T
412-345-1255 F

Dear President Judge Fox, President Judge Dugan, and Supervising Judge Tucker:

As COVID-19 spreads rapidly across Philadelphia, we urge you to take immediate action to release people from the city jails, to develop and implement policies that align with guidance from public health experts, and to minimize the harm inflicted on incarcerated people, correctional officers, and the broader community. The commonwealth, the city of Philadelphia, the District Attorney's Office, the Defender Association of Philadelphia, and the Philadelphia Police Department have taken necessary, and even extraordinary, steps to reduce the jail population. In the face of the rapidly closing window for averting a catastrophe, we urge the First Judicial District to join these entities by taking immediate action to avoid massive human suffering and death. The March 18, 2020 emergency order from our Supreme Court, while generally closing courts to the public, contemplated the need for each judicial district to take immediate and necessary actions to mitigate this crisis and protect public health. The necessary steps we urge you to take fall squarely within the Supreme Court's order. Like all other public agencies, the First Judicial District will come under intense scrutiny for how the system responds to this national public health crisis. It must act now.

Leading experts in the field warn that, if inaction continues, the “[*Epicenter of the Pandemic will be Jails and Prisons.*](#)”¹ In a correctional setting, the only known measures to prevent the spread of the virus are strict screening and isolation of all individuals entering the facility, social distancing, and improved hygiene. As staff and new detainees enter facilities daily, with asymptomatic transmission and the limited availability of test kits, this first measure will be difficult to implement. Moreover, as individuals in jails have no ability to practice social distancing and limited ability to ensure proper hygiene, preventing the spread of infection once the virus is inside a detention facility will be [*virtually impossible.*](#)² Jails are also disproportionately filled with people who suffer from health conditions that put them at a [*higher risk than the general population.*](#)³ Transmission in jails will also endanger the broader community, as staff enter and leave daily, and will carry the virus with them, [*putting exponentially more people at risk of severe illness and death.*](#)⁴ Every decision to send a person into the jails or to deny requests for release will thus increase the risk of an outbreak.

Dr. Joseph Amon, Director of the Office of Global Health at Drexel University, is sounding the alarm, warning courts and prisons that they must “**act now**” to avert a dire public health crisis. Courts should be “fully prepared now and *not* wait until after there is an explosive number of cases,” because by then it will be too late. Dr. Amon recommends that no one should be put into prison or jail who could be safely diverted and that the courts should release whomever they can safely release and have contingency plans for how they will ensure proper medical treatment for the cases that will appear. The window to act is rapidly closing. Failure to take immediate and decisive action to release individuals from custody will almost certainly mean a death sentence for older adults and community members with medical conditions that put them at risk of serious COVID-19 infection.

Failure to act now will also disproportionately harm people of color within the district. The jails are disproportionately filled with Black and Latinx individuals. Despite Black people constituting only 44% of Philadelphia’s population, [*nearly 70%*](#) of the current Philadelphia jail population is Black.⁵ To take no action to protect these individuals means that Black and Brown

¹ Amanda Klonsky, *An Epicenter of the Pandemic Will Be Jails and Prisons, if Inaction Continues*, The New York Times, Mar. 12, 2020, <https://www.nytimes.com/2020/03/16/opinion/coronavirus-in-jails.html>.

² *Id.*

³ Jennifer Gonnerman, *How Prisons and Jails Can Respond to the Coronavirus*, The New Yorker, Mar. 16, 2020, <https://www.newyorker.com/news/q-and-a/how-prisons-and-jails-can-respond-to-the-coronavirus>.

⁴ Josiah Rich, Scott Allen and Mavis Nimoh, *We must release prisoners to lessen the spread of coronavirus*, The Washington Post, Mar. 17, 2020, <https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-lessen-spread-coronavirus/>.

⁵ The First Judicial District, *Philadelphia Jail Population Report - July 2015 – January 2020*, Mar. 11, 2020, <https://www.phila.gov/media/20200311100018/Philadelphia-jail-population-detailed-snapshot-report-%E2%80%93January-2020.pdf>.

people will be harmed at rates that far exceed the rest of the population. Harm with such disparate impacts is simply impermissible.

As judges, you have the ultimate decision-making authority over decisions about who remains in custody. You must exercise this authority in accordance with the above recommendations in order to limit the number of people who are coming into and forced to remain in carceral facilities.

According to the daily census the Philadelphia Department of Prisons published yesterday, there are approximately 4,500 people incarcerated in the county jails on State Road. There are numerous steps you can take to reduce the number of incarcerated people and ameliorate this grave public health crisis. We implore you to immediately take the actions listed below. The First Judicial District can take each of these actions in a manner that is consistent with the order issued yesterday by the Pennsylvania Supreme Court closing courthouses across Pennsylvania. To the extent that any of these actions requires a hearing, those hearings can occur using the audiovisual technology that is already operational in each of the jails on State Road.

1. Direct Arraignment Court Magistrates to stop setting cash bail.

As numerous health officials have warned, stakeholders must do everything in their power to divert people from entering jails in the first place. Continuing to set cash bail ensures that indigent defendants will be detained.

We understand that despite the ongoing emergency, arraignment court magistrates have continued to impose cash bail on indigent defendants, ensuring that the jail population will continue to rise at a time when decarceration must occur immediately. An analysis of publicly available docket data indicates that **arraignment court magistrates have set monetary bail in 37% of initial bail assignments since the World Health Organization declared the coronavirus a pandemic on March 11, 2020. As of 7:30 a.m., on March 18, 2020, 68% of defendants who were initially assigned cash bail during this period have not yet been able to pay their bail.** For example, two days ago, Arraignment Court Magistrate Francis Bernard imposed \$20,000 on an indigent defendant charged with possession with intent to distribute and the defendant remains in custody. This practice of setting cash bail must end during this crisis.

Other courts have recognized the necessity of such procedures, setting an example for this court. [Cuyahoga County, Ohio](#) judges began expedited hearings on Saturday to help reduce the jail population.⁶ In a single day, they released 38 people from the Cuyahoga County Jail, and they hope to release [at least 200 more people charged with low-level, non-violent crimes.](#)⁷

⁶ Kevin Freeman, *Cuyahoga County jail releasing some inmates early to help minimize potential coronavirus outbreak*, Fox8 News, Mar. 14, 2020, <https://fox8.com/news/coronavirus/cuyahoga-county-jail-releasing-some-inmates-early-to-help-minimize-potential-coronavirus-outbreak/>.

⁷ Nelson Oliveira, *Dozens of inmates released from Ohio jail over coronavirus concerns*, New York Daily News, Mar. 16, 2020, <https://www.nydailynews.com/coronavirus/ny-coronavirus-inmates-released-ohio-jail-over-virus-concerns-20200316-yxukbzspwnfhzkk5gcfnmizqpi-story.html>.

2. Expand Early Bail Review Program to include everyone currently held in custody.

Although the Defender Association is working tirelessly to file petitions on behalf of individual defendants who remain in custody, the First Judicial District has not yet responded with the same diligence or sense of urgency. Moreover, where other jurisdictions have scheduled expedited mass bail review, the First Judicial District has taken no comparable actions.

The First Judicial District should assign an emergency judge, who sits every day, whether *via* video or in court, to review and reassess the bail for every incarcerated individual. The First Judicial District publicly agreed to do this as part of their agreement to the Pennsylvania Supreme Court in the litigation surrounding cash bail. In the face of this looming threat, the First Judicial District should act to ensure this happens immediately.

In [Travis County, Texas, judges have demonstrated the efficacy of this response](#) in releasing more people from local jails on personal bonds (about 50% more often than usual) and focusing on preventing people with health issues who are charged with non-violent offenses from going into the jail system.⁸

3. Issue an order directing the release of everyone over the age of 60, all pregnant women, and everyone with a serious illness or medical condition that puts them at risk.

Currently, 123 people held in the county jails are over the age of 60. According to the Centers for Disease Control and the World Health Organization, older adults and people of any age with serious chronic medical conditions – such as heart disease, lung disease, or diabetes – or who are otherwise immuno-compromised are at higher risk for contracting, and [face a heightened risk of death](#) from, COVID-19.⁹ Other jurisdictions have paved the way for this court to take such actions in response to this dire public health threat. For example, in [Los Angeles County, California](#), the Sheriff reported that they have released more than 600 people to mitigate the risk of virus transmission in crowded jails.¹⁰ In [Hamilton County, Ohio](#), a court order is expected to authorize the sheriff to release people with nonviolent offenses from the county

⁸ Ryan Autullo, *Travis County judges releasing inmates to limit coronavirus spread*, The Statesman, Mar. 16, 2020, <https://www.statesman.com/news/20200316/travis-county-judges-releasing-inmates-to-limit-coronavirus-spread?fbclid=IwAR3VKawwn3bwSLSO9jXBxXNRuaWd1DRLsCBFc-ZkPN1INWW8xnzLPvZYNO4>.

⁹ Betsy McKay, *Who's Most at Risk From the Coronavirus*, The Wall Street Journal, Mar. 14, 2020, <https://www.wsj.com/articles/whos-most-at-risk-from-the-coronavirus-11584048476>.

¹⁰ Salvador Hernandez, *Los Angeles Is Releasing Inmates Early And Arresting Fewer People Over Fears Of The Coronavirus In Jails*, BuzzFeed News, Mar. 16, 2020, <https://www.buzzfeednews.com/article/salvadorhernandez/los-angeles-coronavirus-inmates-early-release>

jail.¹¹ Finally, the [New York Board of Correction recently called for the release of all vulnerable people from New York City jails.](#)¹²

4. Assign an emergency judge, who sits every day, whether via video conference or in court, to hear parole petitions.

As of January 2020, the city jails held hundreds of people serving a sentence. The First Judicial District Court of Common Pleas has the present authority to grant parole to every single one of those individuals. *See* 42 Pa. C. S. § 9775, 9776; *see also Commonwealth v. Becker*, 172 A.3d 35, 39 (Pa. Super. Ct. 2017) (“When the court sentences an offender to a maximum term of imprisonment of less than two years, the common pleas court retains authority to grant and revoke parole.”).

We understand that the District Attorney’s Office, in collaboration with the Defender Association and in communication with the Philadelphia Department of Prisons, assembled over 70 agreed-upon petitions for early parole to jumpstart the release of some of the more vulnerable people. We understand that these petitions were submitted to the court last week, but that the court has yet to act upon or sign these petitions. Under the dire health threat, such delay is unacceptable.

With lives at stake, the emergency judge must move forward and consider release for these individuals immediately. If the assigned judge is unavailable, it must be reassigned immediately to a judge who can rule on the petitions.

5. Expedite a process to immediately review and lift all probation and parole detainers.

As of January 2020, the jails hold 1,141 people incarcerated on allegations of a violation of probation or parole. The Court should immediately release all people held on probation and parole detainers.

We recently learned that, in contrast to Philadelphia, Allegheny County stakeholders, engaged in a coordinated effort to release people in the face of the pending pandemic, released over 50 people who were held on probation detainers from Allegheny County Jail yesterday. Even Allegheny County needs to do more, but the releases are a good start.

¹¹ Kevin Grasha, *Order to authorize Hamilton County sheriff to release low-risk, nonviolent jail inmates*, The Cincinnati Enquirer, Mar. 16, 2020, <https://www.cincinnati.com/story/news/crime/crime-and-courts/2020/03/16/coronavirus-hamilton-county-sheriff-release-low-risk-inmates/5062700002/>

¹² Chelsia Rose Marcus, *Coronavirus prompts Board of Correction to call for release of inmates from NYC jails*, New York Daily News, Mar. 17, 2020, <https://www.nydailynews.com/coronavirus/ny-coronavirus-board-of-correction-release-inmates-nyc-jails-20200317-sfavifzqznhwpayhtcmadwkh6e-story.html>

The Court could immediately issue a judicial administrative order pursuant to its emergency powers lifting all detainees for technical violations of probation and parole.

6. Grant furloughs for those people not eligible for parole or immediate release.

The First Judicial District has the authority to grant furloughs for individuals who are not otherwise eligible for release during the duration of the public health crisis. *See* 42 Pa. C. S. § 9813. Particularly for individuals with pre-existing health conditions and those who are elderly, public health research demonstrates that release from overcrowded jails is a necessary form of medical treatment covered by the furlough authority. Trial courts should exercise this furlough authority until incarceration is no longer medically compromising. *See Com. v. Kehoe*, 863 A.2d 1202 (Pa. Super. Ct. 2004) (finding trial court maintained jurisdiction under predecessor statute to enter an order granting furlough to a *six-month inpatient drug treatment rehabilitation program*).

Due to the magnitude of the public health crisis, every moment of inaction will likely come at a grave human cost. We thus urge you to take the aforementioned measures immediately. We will continue to monitor the situation as it unfolds.

Sincerely,

A handwritten signature in black ink, appearing to read "Witold Walczak". The signature is fluid and cursive, with a large, prominent initial "W".

Witold Walczak, Legal Director
Nyssa Taylor, Criminal Justice Policy Counsel
Hayden Nelson-Major, Independence Foundation Fellow
Erika Nyborg-Burch, Staff Attorney
American Civil Liberties Union of Pennsylvania

Cc: Chief Justice Saylor
Administrative Office of Pennsylvania Courts