

March 26, 2020

***Via Email and U.S. Mail***

Chief Justice Jeffrey S. Bivins  
Justice Cornelia A. Clark  
Justice Holly Kirby  
Justice Sharon G. Lee  
Justice Roger A. Page  
Tennessee Supreme Court  
Supreme Court Building, Suite 321  
401 7th Avenue North  
Nashville, TN 37219-1407

To the Chief Justice and Associate Justices of the Tennessee Supreme Court:

Thank you for your leadership during these unprecedented and challenging times as COVID-19 spreads across Tennessee and the United States. ACLU of Tennessee, Inc. (ACLU-TN) is grateful for the Court's Orders, which underscore the critical need to reduce both court activity across the state and the jail population to protect the welfare and safety of all Tennesseans while at the same guaranteeing due process. As you continue to develop plans that protect the health, safety and civil liberties of all Tennessee residents, please know that the ACLU-TN is ready to serve as a resource.

In your March 25, 2020 Order, the Court requires that judges across the state prepare and submit a written plan to address issues regarding incarceration during the pandemic and the reduction of jail populations. We write to highlight several measures that we urge the Court to recommend in order to guard constitutional rights as well as public health during this time of crisis.

**Release Pre-trial Detainees**

To prevent the further spread of COVID-19, public health officials are unanimous in recommending that we minimize the degree to which Tennesseans are in crowded environments. Governor Lee has strongly discouraged gatherings of more 10 people. As the May 25, 2020 Order recognizes, jails, of course, are crowded environments in which detainees have less ability to follow recommended hygienic measures such as frequent washing of hands, social distancing, etc. Every individual who is arrested and transported to jail presents a possible source of transmission into the jail setting, and every moment such individuals spend in jail presents further opportunity for them to



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become infected as a result of the jail conditions described above. Accordingly, courts can play a major beneficial role in limiting the spread of COVID-19, both inside our jails and in the community more broadly, by doing everything in their power to release pre-trial detainees and ease jail crowding.

One obvious step is to assure the rapid release of detainees on personal bonds, with special attention paid to defendants who are at high risk of serious illness from COVID-19, such as defendants older than 60 and those who have pre-existing medical conditions that place them at risk including, but not limited to, heart disease, lung disease, diabetes and conditions resulting in the individual being immune-compromised. The Tennessee Code already provides that pre-trial detainees should be presumptively released on “personal recognizance or upon execution of an unsecured appearance bond.” T.C.A. § 40-11-115(a).

Courts should be encouraged to apply this statute liberally to ensure the immediate release of most newly arrested pre-trial detainees, including the possibility of promulgating general administrative orders providing for detainees accused of most charges to be released automatically with no cash bond and a notice to appear only if the district attorney general affirmatively moves for a hearing.

In the event that release on recognizance is insufficient, Tennessee Law instructs the Courts to release individuals subject to the “least onerous conditions reasonably likely to assure the defendant’s appearance in Court.” T.C.A. § 40-11-116(a). Courts should be instructed to be careful not to impose conditions on mobility, such as house arrests, that might limit defendants’ ability to seek medical care or care for sick or vulnerable family members.

Additionally, courts should not hesitate to modify existing bond decisions. If someone does not demonstrably present an urgent and unusual threat to an identified and articulable individual based on clear and convincing evidence, they should not currently be detained in a crowded jail environment. Accordingly, courts should consider eliminating existing bail conditions (including conditions such as unaffordable GPS monitors) for all defendants who are currently in jail as the result of bonds or release conditions that they cannot afford. Again, general administrative orders providing for the elimination of bond or other requirements in cases where defendants have not paid their cash bond would present the most efficient means of rapidly achieving these goals.



## **Postpone Unnecessary Hearings for Non-Detained Defendants and Civil Cases, and Minimize the Use of Warrants and Bonds**

This Court's prior Orders called on the lower courts to postpone, stay, or reschedule hearings in most civil cases and in criminal cases except when related to the protection of constitutional rights. While these Orders provided necessary instruction to the lower courts in confronting this health crisis, we have received reports that some Judges are not following the Order.

To help ensure compliance going forward, ACLU-TN urges the Court to clarify its order and provide specific examples to the lower courts. In particular, courts should postpone sentencing hearings to protect the current jail population from the possibility that the defendant being sentenced might be ill, to protect the defendant from the risk of transmission in the carceral setting, and to reduce jail crowding. Similarly, courts should do everything possible to eliminate mass hearings that involve numerous accused individuals appearing in large groups, often in small and contained shared spaces or cells. Reducing unnecessary hearings will also help to mitigate risks to those who must be in court, including judges, attorneys and court staff, whose health and commitment to continue working is vital to keeping our courts running. When delays are necessary in any criminal case as the result of COVID-19 logistical issues, pre-trial release should be the rule. In cases that are not postponed or rescheduled automatically, courts should not issue bench warrants as the result of a party's non-appearance.

Additionally, in cases that are proceeding, courts can reduce the risk to their staff and the general public by reducing criminal defendants' need to appear in person for non-essential hearings. In practice, many criminal hearings are preliminary hearings, status conferences or motion hearings, at which a defendant's attendance is not truly necessary unless they wish to be present. Of course, any person accused of a crime who wishes to be present at any hearing in their case, must continue to be permitted to do so.

## **Do Not Order Detention for Violation of Probation or Parole**

Probationers may find it difficult to comply with many of the conditions of their parole or probation in light of the social upheaval caused by COVID-19. Local "Safer at Home" directives, workplace shutdowns, transportation disruptions, office closures, childcare issues, and other challenges make it difficult for everyone, including



probationers, to attend required appointments, satisfy work requirements, and otherwise comply with the many conditions that govern their lives. Strict compliance with certain conditions of probation, such as appearing for in-person meetings with probation officers or continuing to work in what might be crowded environments, are inadvisable as a matter of public health. Probation officers and courts should work together to formally modify or suspend such conditions and should neither impose nor enforce conditions on mobility that might limit probationers' ability to seek medical care or care for sick or vulnerable family members.

In any case, rather than trying to adjudicate probation violations on a case-by-case basis — a time-consuming process in which courts would likely struggle to keep up with the best science and public health advice — courts should adopt a comprehensive policy of not ordering probationers or parolees detained while the COVID-19 threat persists except in the most extreme cases. This will serve to reduce the need for court hearings, each of which presents a risk to court staff, the public, and the probationers and parolees themselves. It will also, of course, reduce the number and pace of individuals moving in and out of jails, thereby reducing the risks for those in jail and to the public at large.

For similar reasons, courts should suspend all requirements to make payments towards court fines or debts given the economic upheaval that will be experienced by many Tennesseans, especially low-income individuals, in the immediate future. Interest should not accumulate on court debt, and show-cause hearings for non-payment should be suspended until the crisis abates.

### **Work with Local Law Enforcement Officials and Prosecutors to Limit Arrests to the Most Serious Offenses and to Increase Medical Releases**

Another critical way to reduce the risk of transmission between the outside world and jails is to reduce initial arrests in the first place. The Court should use every means available to it to urge local law enforcement and prosecutors to reduce arrests. Law enforcement officials should be encouraged to issue tickets and notices to appear rather than making arrests for as many charges as possible, and especially for common misdemeanors such as driving without insurance or with a suspended or revoked license. Similarly, prosecutors should be urged not to file charges in all but the most serious of cases in which immediate action is necessary to address an



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imminent harm. Judges should raise these concerns with prosecutors at every opportunity, including in response to warrant requests.

### Conclusion

Many thanks for your thoughtful leadership during these unsettling and uncertain times. The ACLU of Tennessee is well aware of the challenges confronting public officials in responding to the COVID-19 outbreak. Please know we stand ready to offer any additional assistance to simultaneously ensure public health and safety while also respecting the civil rights and liberties of all Tennesseans.

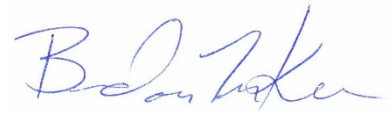
Respectfully,



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