

SUPREME COURT, STATE OF COLORADO
Colorado State Judicial Building
2 East 14th Avenue
Denver, Colorado 80203

IN RE:

**OFFICE OF THE STATE PUBLIC DEFENDER, OFFICE OF
THE ALTERNATE DEFENSE COUNSEL, AND THE
COLORADO CRIMINAL DEFENSE BAR, ON BEHALF OF
THEIR CURRENTLY INCARCERATED CLIENTS,
PETITIONERS**

V.

**THE COUNTY AND DISTRICT COURTS FOR THE FIRST
THROUGH TWENTY-SECOND JUDICIAL DISTRICTS,
THE DENVER COUNTY COURT, AND THE CHIEF
JUDGES THEREOF:**

**Jeffrey R. Pilkington, Chief Judge, 1st Judicial District
Michael A. Martinez, Chief Judge, 2nd Judicial District
Leslie J. Gerbracht, Chief Judge, 3rd Judicial District
William Bain, Chief Judge, 4th Judicial District
Mark D. Thompson, Chief Judge, 5th Judicial District
Jeffrey R. Wilson, Chief Judge, 6th Judicial District
J. Steven Patrick, Chief Judge, 7th Judicial District
Stephen E. Howard, Chief Judge, 8th Judicial District
James Berkley Boyd, Chief Judge, 9th Judicial District
Deborah Eyler, Chief Judge, 10th Judicial District
Patrick W. Murphy, Chief Judge, 11th Judicial District
Michael A. Gonzales, Chief Judge, 12th Judicial District
Michael K. Singer, Chief Judge, 13th Judicial District
Michael A. O'Hara, III, Chief Judge, 14th Judicial District
Mike Davidson, Chief Judge, 15th Judicial District
Mark A. MacDonnell, Chief Judge, 16th Judicial District
Emily E. Anderson, Chief Judge, 17th Judicial District
Michelle Amico, Chief Judge, 18th Judicial District
James F. Hartmann, Jr., Chief Judge, 19th Judicial District
Ingrid S. Bakke, Chief Judge, 20th Judicial District
Brian J. Flynn, Chief Judge, 21st Judicial District
Douglas S. Walker, Chief Judge, 22nd Judicial District
Theresa Spahn, Presiding Judge, Denver County Court
RESPONDENTS**

COURT USE ONLY

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Case Number: 20SA____

IN RE:

**OFFICE OF THE STATE PUBLIC DEFENDER, OFFICE OF THE ALTERNATE
DEFENSE COUNSEL, AND THE COLORADO CRIMINAL DEFENSE BAR,**

V.

**THE COUNTY AND DISTRICT COURTS FOR THE FIRST THROUGH TWENTY-
SECOND JUDICIAL DISTRICTS, THE DENVER COUNTY COURT, AND THE
CHIEF JUDGES THEREOF**

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with the requirements of C.A.R. 32, including all formatting requirements in that rule, as required by C.A.R. 21(c). I acknowledge that the petition may be stricken if it does not comply with the requirements of C.A.R. 32.



INTRODUCTION

As this Court recently recognized, “the United States now lies at the epicenter of a global pandemic of COVID-19, a highly contagious and potentially lethal respiratory disease caused by a novel coronavirus.” *In Re: Interrogatory on House Joint Resolution 20-1006*, 2020 CO 23, ¶ 2. Authorities have asked people to stay at home and practice “social distancing” to limit the spread of this infection. *Id.* at ¶ 10. Even so, “[t]he pandemic is expected to continue into May and possibly well beyond.” *Id.* at ¶ 11.

For Coloradans detained in densely-populated jails, this is a particularly frightening time. These individuals lack the ability to avoid contact with others. As a result, COVID-19 is likely to spread within jails, and from jails to the broader community. The best way to mitigate the spread of COVID-19 within and from jails is to significantly reduce jail populations. But jails can only do so much without court action. Thus, courts should take steps to help depopulate jails.

ISSUE PRESENTED

Whether trial courts must take steps to reduce jail populations in response to the COVID-19 crisis to protect the constitutional rights of incarcerated people and the health of the general public.

PETITIONERS AND PROPOSED RESPONDENTS

The petitioners in this original proceeding are the Office of the State Public Defender, the Office of the Colorado Alternate Defense Counsel, and the Colorado Criminal Defense Bar.

The Office of the State Public Defender represents thousands of people accused and convicted of crimes throughout Colorado. Many of those people are currently incarcerated in Colorado, either awaiting proceedings on their cases or serving sentences following convictions. Under section 21-1-101(1), C.R.S., the Office of the State Public Defender is authorized to “serve [their] clients independently of any political considerations or private interests, provide legal services to indigent persons accused of crime that are commensurate with those available to nonindigents, and conduct the office in accordance with the Colorado rules of professional conduct and with the American bar association standards relating to the administration of criminal justice, the defense function.”

The Office of the Alternate Defense Counsel (“OADC”) provides representation for indigent persons in criminal and juvenile delinquency cases in which the Public Defender determines that an ethical conflict of interest exists. Like the Public Defender, OADC is mandated to “provide to indigent persons accused of crimes, legal services that are commensurate with those available to

non-indigents, and conduct the office in accordance with the Colorado Rules of Professional Conduct and with the American Bar Association Standards relating to the administration of criminal justice, the defense function.” § 21-2-101(1), C.R.S.

The Colorado Criminal Defense Bar (CCDB) is a non-profit organization that provides training and support to the criminal defense community to promote zealous advocacy for those accused of crimes. With almost 1000 members, CCDB is the largest criminal defense bar association in the State. Its members—attorneys, paralegals, and investigators in both the public and private sectors—are dedicated to the representation of criminal defendants at trial, on appeal, and post-conviction. CCDB works to ensure that Colorado’s criminal justice system embodies the principles of liberty, justice, and equality.

The proposed respondents are the county and district courts for each Colorado Judicial District via the Chief Judges of each Colorado Judicial District and the Presiding Judge of the Denver County Court, each of whom this Court has designated as the “administrative head of all district and county courts within a judicial district.” CJD 95-01, p. 1 (as amended, August 24, 2016).

OTHER INTERESTED PARTIES

The following organizations have requested that counsel inform this Court that they support the relief sought in this petition: American Civil Liberties Union of Colorado, Colorado Criminal Justice Reform Coalition, Disability Law Colorado, Lawyers Civil Rights Coalition, the Colorado Lawyers Committee, and the Interfaith Alliance. These entities have all been exceptionally active in working to protect the rights and lives of Colorado persons who are incarcerated and detained during this COVID-19 disaster.

ENTITIES FROM WHOM RELIEF IS SOUGHT

Petitioners seek relief against all Colorado district and county courts with authority to issue arrest warrants, set conditions of bail and probation, and impose or modify jail sentences, along with the chief judges with administrative authority over those courts. *See* CJD 95-01 (chief judge is “administrative head” of courts within a district). There is no specific underlying proceeding; none is required. *See* C.A.R. 21(d)(2)(B) (petitioner should identify “the underlying proceeding, if any”).

RELIEF SOUGHT

While some Colorado trial courts have taken prompt and reasonable action to reduce jail populations in response to the COVID-19 pandemic, others have not. A swift, unified, and comprehensive response is needed.¹ Petitioners ask this Court to facilitate the reduction of jail populations by directing trial courts to (1) reduce the number of people taken into custody in the first instance, (2) release pretrial detainees whenever possible, and (3) shorten jail and work-release sentences.² If taken immediately, these emergency measures will mitigate the spread of COVID-19 among incarcerated people and in the broader community. This will save lives.

JURISDICTION

This Court will elect to hear a case under C.A.R. 21 when one of four conditions is present: (1) “the normal appellate process would prove inadequate,”

¹ Given the need for quick action, Petitioners ask this Court to either grant a rule to show cause and make it absolute without further briefing, *see* C.A.R. 21(i), or to set an expedited briefing schedule, *see In Re: Interrogatory on House Joint Resolution 20-1006*, 2020 CO 23, ¶ 15 (noting that this Court ordered expedited briefing in that case, which was also prompted by the COVID-19 crisis).

² This petition seeks relief as to jail populations, not as to prison populations. The Governor issued Executive Order 2020-16 setting forth steps for the Department of Corrections (“DOC”) regarding decarceration of DOC inmates and people on parole. Consequently, the current petition is directed mainly at jail populations, although Petitioners’ suggested modifications to Colo. R. Crim. P. 35(b) could also apply to DOC inmates. This court could grant additional or different relief from that requested here as it deems appropriate.

People v. Shank, 420 P.3d 240, 243 (Colo. 2018); (2) “there is an overriding public interest in a swift and certain resolution of the case,” *id*; (3) the petition “raises an issue of first impression that is of significant public importance,” *People v. Voth*, 312 P.3d 144, 148 (Colo. 2013); or (4) “a party may suffer irreparable harm absent relief.” *People v. Tafoya*, 434 P.3d 1193, 1195 (Colo. 2019).

Each of these grounds is implicated here. Petitioners seek a speedy statewide reduction in jail populations to limit the imminent spread of the COVID-19 virus. Normal appellate processes cannot accomplish this kind of swift, coordinated statewide action. This issue is one of first impression, and it is one of significant public importance. *See Voth*, 312 P.3d at 148. Jail inmates, jail staff, and the public at large all have a vested interest in ensuring that jails do not become incubators of COVID-19, which they are likely to do without a prompt reduction in jail populations. *See* Attachment A (Letter from Dr. Franco-Paredes); Attachment B (Addendum to Letter from Dr. Franco-Paredes); Attachments C-F (Letters from Regional Public Defender Offices). There is “an overriding public interest in a swift and certain resolution of the case,” *Shank*, 420 P.3d at 243, because we have only a short period of time to curb the spread of this virus. *See* Attachment A. Finally, jail inmates and others “may suffer irreparable harm absent relief,” *Tafoya*,

434 P.3d at 1195, because COVID-19 can cause dire health consequences, including death. *See* Attachment A.

This Court has authority to take the actions requested in this petition pursuant to its power to issue writs, its power to exercise superintending authority over lower courts, and its rulemaking authority. *See* Colo. Const. art. VI, §§ 2, 3, 21.

FACTUAL AND PROCEDURAL BACKGROUND

On March 11, 2020, the World Health Organization declared the spread of COVID-19 to be a global pandemic.³ Citing “the alarming levels of spread and severity” and “the alarming levels of inaction,” it called for countries to take “urgent and aggressive action.”⁴ In Colorado, the Governor declared a Public Health Emergency identifying COVID-19 as an imminent threat to the health and safety of the community, requiring emergency protective actions. Shortly afterward, he mandated all people in Colorado to stay at home to prevent contracting or spreading this deadly disease. *In Re: Interrogatory on House Joint Resolution 20-1006*, 2020 CO 23, ¶ 10. For most, normal life has ceased.

³ *See* World Health Organization, Director-General Opening Remarks (March 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

⁴ *Id.*

Businesses, restaurants, schools, government offices, and churches are closed. *Id.* at ¶¶ 9-10. But for incarcerated people, who live in conditions ripe for rampant spread of disease and lack the autonomy to self-isolate, daily life continues as usual.

COVID-19 can cause “severe respiratory illness, as well as damage to other major organs.”⁵ Approximately one in five people infected experience life-threatening complications, and between 1% and 3.4% die.⁶ Treating serious cases therefore “requires significant advanced support, including ventilator assistance for respiration and intensive care support.”⁷ For high-risk patients who survive, the effect of contracting this virus can be permanent and debilitating, and can include “profound deconditioning, loss of digits, neurologic damage, and loss of respiratory capacity.”⁸ For every ten people in the high-risk population infected, more than one will die.⁹

⁵ Declaration of Dr. Marc Stern, *Dawson v. Asher*, No. 2:20-cv-00409-JLR-MAT (W.D. Wash. Mar. 16, 2020), at ¶ 6, <https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-marc-stern>.

⁶ Vox, *Why Covid-19 is worse than the flu, in one chart*, <https://www.vox.com/science-and-health/2020/3/18/21184992/coronavirus-covid-19-flu-comparison-chart>.

⁷ *Supra*, note 5.

⁸ Declaration of Dr. Jonathan Louis Golob, *Dawson v. Asher*, No. 2:20-cv-00409-JLR-MAT (W.D. Wash. Mar. 16, 2020), at ¶ 4, <https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-jonathan-golob>.

⁹ *Id.*

The number of people infected is growing exponentially, and the number of people diagnosed reflect only a portion of those infected.¹⁰ Very few people have been tested, and many of those infected have no symptoms.¹¹ Even where an individual tests negative for COVID-19, the results are not dispositive because there is a 15-30% false negative rate.¹² *See* Attachment B (Addendum to Letter from Dr. Franco-Paredes). Thousands of people are therefore carrying a potentially fatal disease that is easily transmitted—and few are aware of it.

The novel coronavirus has characteristics that make it particularly difficult to contain and dangerous for those who become infected. First, because COVID-19 is a new disease, there is no immunity within the population. Second, this virus spreads through both airborne mechanisms (e.g., coughing) and touching of

¹⁰ Melissa Healy, “True Number of US Coronavirus Cases is Far Above Official Tally, Scientists Say,” *L.A. Times* (Mar. 10, 2020), <https://www.latimes.com/science/story/2020-03-10/us-coronavirus-cases-far-above-official-tally-scientists>.

¹¹ Roni Caryn Rabin, “They Were Infected with the Coronavirus. They Never Showed Signs,” *N.Y. Times* (Feb. 26, 2020, updated Mar. 6, 2020), <https://www.nytimes.com/2020/02/26/health/coronavirus-asymptomatic.html>; Aria Bendix, “A Person Can Carry And Transmit COVID-19 Without Showing Symptoms, Scientists Confirm,” *Bus. Insider* (Feb. 24, 2020), <https://www.sciencealert.com/researchers-confirmed-patients-can-transmit-the-coronavirus-without-showing-symptoms>.

¹² *A ‘negative’ coronavirus test result doesn’t always mean you aren’t infected*, *The Washington Post* (March 26, 2020), available at <https://www.washingtonpost.com/science/2020/03/26/negative-coronavirus-test-result-doesnt-always-mean-you-arent-infected/>.

contaminated surfaces or infected individuals.¹³ The estimated incubation period is between 2 and 14 days, suggesting the virus can be transmitted before symptoms are apparent.¹⁴ The best way to combat the virus is to stop it from spreading.

I. Colorado jails are not equipped to mitigate the spread of COVID-19.

There are currently thousands of people detained in Colorado jails.¹⁵ The majority of them have not been convicted of a crime. These thousands of people are living in “petri dishes of infection,”¹⁶ and they interact with corrections officers, judicial officials, court personnel, legal counsel, and medical professionals who return to their communities each day, potentially bringing that infection with them.

¹³ Cai J, Sun W, Huang J, Gamber M, Wu J, He G. Indirect virus transmission in cluster of COVID-19 cases, Wenzhou, China, 2020. *Emerg Infect Dis.* 2020 Jun. doi: 10.3201/eid2606.200412, https://wwwnc.cdc.gov/eid/article/26/6/20-0412_article.

¹⁴ *Coronavirus Disease COVID-19 Symptoms*, Centers for Disease Control (updated: Feb. 29 2020), <https://www.cdc.gov/coronavirus/2019-ncov/about/symptoms.html>; Centers for Disease Control, *Coronavirus Factsheet* (Mar. 3, 2020),

¹⁵H.B.19-1297, Jail Data, https://cdpsdocs.state.co.us/ors/Data/Data_Instruments/HB19-1297/Dashboard/HB19-1297.html

¹⁶ *See Coronavirus Transforming Jails Across the Country* (March 21, 2020), available at <https://www.themarshallproject.org/2020/03/21/coronavirus-transforming-jails-across-the-country>.

COVID-19 has already entered Colorado jails, including those in Denver, Colorado Springs, and Greeley.¹⁷ There are also several other inmates at the Denver jail showing symptoms consistent with COVID-19.¹⁸ And just this past Wednesday, an El Paso sheriff's deputy, Jeff Hopkins, tragically passed away from COVID-19 at the age of 41.¹⁹ He was the eighth El Paso County Sheriff's Office Employee diagnosed with the virus.²⁰ This tragic death underscores the urgent nature of the spread of coronavirus in jails—for all people who work or live there.

Officials and experts urge “social distancing” or “physical distancing”—isolating oneself from other people as much as possible to contain the spread of COVID-19, and maintaining a six-foot distance from others.²¹ Other federally-recommended precautions include frequent hand-washing, alcohol-based hand sanitizers, and frequent cleaning and disinfecting of surfaces touched by any

¹⁷*Inmate at Denver downtown jail tests positive for coronavirus*, The Denver Post (Mar. 30, 2020), available at: <https://www.denverpost.com/2020/03/30/denver-jail-coronavirus-covid-positive-test/>; *El Paso County Sheriff's Deputy Dies of COVID-19*, The Denver Channel (Apr. 2, 2020), <https://www.thedenverchannel.com/news/coronavirus/el-paso-county-sheriffs-deputy-dies-of-covid-19>; Attachment C (Letter from Weld County Public Defender).

¹⁸ *22 inmates at Denver's two jails under observation after showing coronavirus symptoms, none have been tested: About two-thirds of the inmates showing symptoms are at the downtown jail*, The Denver Post (March 20, 2020), available at <https://www.denverpost.com/2020/03/20/denver-jail-coronavirus-observation/>.

¹⁹ *El Paso County Sheriff's Deputy Dies of COVID-19*, *supra*, note 17.

²⁰ *Id.*

²¹ *See supra* notes 5 & 8.

person.²² These are the only known preventative measures and are crucial because “stealth transmission” is a major driver of the pandemic.²³

It is virtually impossible to engage in these basic preventive measures in a county jail. In the words of Dr. Franco-Paredes, an infectious disease physician with expertise in epidemics and pandemics: “The conditions in these facilities do not allow for appropriate infection control protocols and will make the current COVID-19 pandemic worse.” Attachment A (Letter from Dr. Franco-Paredes). In addition, jail populations disproportionately contain individuals vulnerable to illness, including people suffering from severe psychiatric and intellectual disabilities who should not be placed in isolation. *See* Attachment G (Letter from Forensic Psychologists and Professors).

²² Centers for Disease Control, Steps to Prevent Illness: https://www.cdc.gov/coronavirus/2019-ncov/about/prevention.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fabout%2Fprevention-treatment.html; *see also supra* notes 3 & 5.

²³ *Stealth Transmission’ Fuels Fast Spread of Coronavirus Outbreak*, Infectious Disease (Mar. 16 2020), available at: <https://www.mailman.columbia.edu/public-health-now/news/stealth-transmission-fuels-fast-spread-coronavirus-outbreak>.

Thus, COVID-19 will undoubtedly spread within jails.²⁴ Some jails in other states have already experienced serious outbreaks. On March 23, 2020, at the Cook County jail in Chicago, there were two positive diagnoses.²⁵ A week later, 101 incarcerated people and a dozen sheriff's deputies had tested positive.²⁶ The infection rate in the Rikers Island jail is seven times higher than the rate in New York City and eighty-seven times higher than the nation at large.²⁷

Colorado jails are not equipped to mitigate the spread of this novel, deadly virus, and their inability to do so places everyone at risk. In Weld County, an inmate recently tested positive for COVID-19. He had been incarcerated since

²⁴ Centers for Disease Control, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (updated Mar. 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>; *Coronavirus Update: Rikers Island Rate of Infection 7 Times Higher than Citywide, Legal Aid Says*, CBS Local (Mar. 26, 2020), https://newyork.cbslocal.com/2020/03/26/coronavirus-rikers-island/?utm_source=The+Appeal&uutm_campaign=d95c211487-

²⁵ *Two Cook County Jail detainees test positive for coronavirus*, Chicago Sun Times (Mar. 23, 2020), <https://chicago.suntimes.com/2020/3/23/21191438/two-cook-county-jail-detainees-test-positive-covid-19-coronavirus>

²⁶ *101 inmates at Cook County Jail confirmed positive for COVID-19*, Chicago Sun Times (Mar. 30, 2020), <https://chicago.suntimes.com/coronavirus/2020/3/29/21199171/cook-county-jail-coronavirus-positive-101-cases-covid-19>

²⁷ *Coronavirus Update: Rikers Island Rate of Infection 7 Times Higher than Citywide, Legal Aid Says*, CBS Local (Mar. 26, 2020), https://newyork.cbslocal.com/2020/03/26/coronavirus-rikers-island/?utm_source=The+Appeal&uutm_campaign=d95c211487-EMAIL_CAMPAIGN_2018_08_09_04_14_COPY_01&utm_medium=email&utm_term=0_72df992d84-d95c211487-58419231.

2018, so he contracted this virus in the jail. Two Greeley jail deputies have also tested positive. The jail is instituting procedures to monitor new inmates for symptoms, and it has taken some steps to try to reduce exposure. However, the simple fact is that jails are enclosed spaces containing many people. Most of those people are pretrial detainees; the jail has very limited power to release them. Thus, the jail cannot significantly decrease its population density without action from the courts. *See* Attachment C (Letter from Weld County Public Defender).

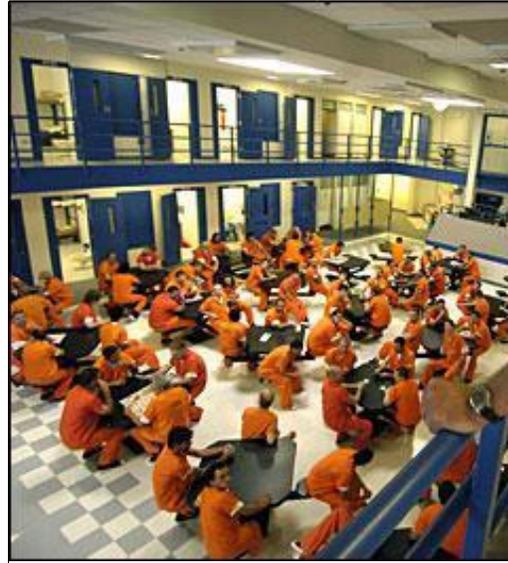
According to credible reports received by petitioners from inmates and attorneys, many county jails have instituted few changes to daily routines to mitigate the spread of COVID-19. For instance, in El Paso County, where many people are displaying symptoms consistent with coronavirus, there have been few changes in the daily routines of those detained. *See* Attachment D (Letter from El Paso County Public Defender). Hand sanitizer is not provided and cleaning supplies remain limited. And inmates are still being housed with up to seven others in a single cell with a single communal toilet, being transported to and from court in groups, and eating meals in close proximity to one another. *Id.*

In Adams County, there is at least one pod in the jail where several people have been coughing and had fevers, but none of them has been quarantined or tested. Attachment E (Letter from Adams County Public Defender). No hand

sanitizer is available and there has been no extra cleaning. *Id.* The same is true in jails in the 13th Judicial District. Attachment F (Letter from Logan County Public Defender). In Yuma and Washington County, attempts to quarantine sick people have been largely ineffective and neither jail is conducting widespread cleaning or issuing protective equipment for detained people or staff. *Id.*

Photos from jails across Colorado depict conditions that are ripe for the spread of this virus:





As these photos demonstrate, jails typically do not allow for social distancing.²⁸ Rather, the close proximity in typical jail settings, as demonstrated above, will foster rampant spread of the virus.

“Reducing the number of incarcerated individuals is necessary for effective infection control[.]” Attachment A (Letter from Dr. Franco-Paredes). This is critical not only for the health of people who are incarcerated, but also for the

²⁸ Top photo from: *Colorado task force to study more jail releases on personal recognizance*, The Gazette (Aug. 27, 2017), available at: https://gazette.com/crime/colorado-task-force-to-study-more-jail-releases-on-personal/article_54b9054c-a30d-56f8-bf2b-cf3738951e52.html; Bottom left photo: *El Paso County jail care provided is under fire, \$63 million contract is being re-evaluated*, Denver Post (May 22, 2017), available at: <https://www.denverpost.com/2017/05/22/el-paso-county-jail-health-care-provider/>; Bottom right photo: *Larimer pursues plan to ease jail woes*, The Denver Post (July 20, 2005), available at: <https://www.denverpost.com/2005/07/20/larimer-pursues-plan-to-ease-jail-woes/>

general public, because “[t]he broader health system does not have the capacity to handle a wave of critically ill patients coming from jails and prisons in addition to the expected community outbreak.” *Id.* In this unique public health emergency, release enhances the safety of other people and the community. *Id.*; *see also* Attachment H (Letter from Forensic Psychologists and Professors); Attachment H (Letter from Law Professors). In an addendum, Dr. Franco-Paredes concludes, “the PROMPT RELEASE of individuals with medical conditions at risk of severe disease and death due to coronavirus infection, and prompt reduction in incarcerated populations overall, is a high impact public health priority to reduce the devastation of the COVID-19 outbreak.” Attachment B (Addendum to Letter from Dr. Franco-Paredes).

Individuals must be able to exercise self-protective measures in a sanitary, disinfected space and maintain social distance from others to slow the virus’s spread.

II. Other states have demonstrated that it is feasible to take immediate action to prevent the spread of COVID-19 in jails.

Confronted with the realities discussed above, other states have taken steps to limit incarceration in jails:

- In New Jersey, the Supreme Court issued an order that will release up to a thousand individuals pretrial. This Order, which emphasizes the important public safety reasons for significantly reducing jail

populations, directs that any person in the State of New Jersey currently serving a county jail sentence as a condition of probation or as a result of a municipal court conviction be released within 48 hours.²⁹

- In California, the Chief Justice encouraged courts to release individuals who were within 60 days of completing their sentences, release individuals without bail on lower-level offenses, and reduce the number of people held on violations of supervised release conditions.³⁰
- In Montana, the Supreme Court urged lower courts to “release, without bond, as many prisoners as you are able, especially those held for non-violent offenses.” Montana Chief Justice Mike McGrath explained: “Due to the confines of [correctional] facilities, it will be virtually impossible to contain the spread of the virus.”³¹
- The Chief Justice of the South Carolina Supreme Court ordered that everyone held on bond in a non-capital case be released, unless there exists an “unreasonable danger” or “extreme flight risk.”³²

²⁹ A copy of the Court’s Order is available at: https://www.aclu-nj.org/files/5415/8496/4744/2020.03.22_-_Consent_Order_Filed_Stamped_Copy-1.pdf

³⁰ Chief Justice Cantil-Sakauye, California Chief Justice Issues Second Advisory on Emergency Relief Measures (Mar. 20, 2020), <https://newsroom.courts.ca.gov/news/california-chief-justice-issues-second-advisory-on-emergency-relief-measures>.

³¹ Letter from Mike McGrath, Chief Justice of Montana Supreme Court, to Montana Courts of Limited Jurisdiction Judges (Mar. 20, 2020), <https://courts.mt.gov/Portals/189/virus/Ltr%20to%20COLJ%20Judges%20re%20COVID-19%20032020.pdf?ver=2020-03-20-115517-333>

³² Memorandum from Donald W. Beatty, Chief Justice of South Carolina Supreme Court, to Magistrates, Municipal Judges, and Summary Court Staff (Mar. 16, 2020), <https://www.sccourts.org/whatsnew/displayWhatsNew.cfm?indexId=2461>.

- Kentucky’s Chief Justice John Minton Jr. urged state court officials “to clear out all of the jail inmates you safely can, ahead of the virus, if you aren’t doing so.”³³
- The Washington, D.C. Superior Court Chief Judge issued an emergency order allowing police and prosecutors to exercise discretion to determine whether a person arrested should be held until their first court appearance or given citation release with notice of their future court date.³⁴
- The Chief Justice of the Ohio Supreme Court pressed for the release of vulnerable incarcerated individuals.³⁵

Both Massachusetts and Hawaii have petitions similar to this one pending in their respective State Supreme Courts.³⁶

Here in Colorado, this Court and trial courts have closed courthouses, canceled trials, and ordered hearings by videoconference in order to protect court

³³ See Kentucky Department of Public Advocacy, “Reduce Jail Population to Protect KY from COVID-19,” <https://dpa.ky.gov/News-and-PublicInformation/Pages/Reduce-Jail-Population-to-Protect-KY-from-COVID19.aspx>; <https://twitter.com/BGPPolitics/status/1241037710653079552>

³⁴ “DC Superior Court Issues Emergency Order Allowing Police/Prosecutorial Discretion re: Detaining Arrestees,” District of Columbia Courts Newsroom (Mar. 16, 2020), <https://newsroom.dccourts.gov/press-releases/stories-20200316>; http://www.dccourts.gov/sites/default/files/Order_3-16-20.pdf

³⁵ See *Release Ohio Jail Inmates Vulnerable to Coronavirus, Chief Justice Urges*, WLMT (Mar. 19, 2020), <https://www.nbc4i.com/news/state-news/ohio-chief-justice-urges-release-of-those-in-jail-vulnerable-to-coronavirus/>

³⁶ See Emergency Petition for Relief Pursuant to G.L. c. 211, § 3, https://www.aclum.org/sites/default/files/field_documents/cpcs_macdl_v._chief_justice_of_the_trial_court_-_211_3_petition.pdf (Mar. 24, 2020); *Hawaii officials looking to reduce jail populations to limit COVID-19 spread*, Stara Advertiser, (Mar. 26, 2020), <https://www.staradvertiser.com/2020/03/26/hawaii-news/chief-justice-wants-jail-populations-reduced-to-limit-covid-19-infections/>

staff and the public. *See In Re: Interrogatory on House Joint Resolution 20-1006*, 2020 CO 23, ¶ 9. Incarcerated people deserve similar protection. This Court should act to promote public safety by directing trial courts to take steps to reduce jail populations.

ARGUMENTS IN SUPPORT OF REQUEST FOR RELIEF

I. Colorado’s jail inmates have a constitutional right to be held in safe conditions.

People in custody have a constitutional right to a safe and sanitary environment. When the State holds a person in custody “and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.” *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989); U.S. Const. amends. V, VI, VIII, XIV; Colo. Const. art. II, §§ 20, 25.

Where a person is detained after conviction, the Eighth Amendment and article II, section 20 of the Colorado Constitution require the government to provide conditions of reasonable health and safety. *See Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (“An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.”). Conditions

that pose an unreasonable risk of “future harm” violate the Eighth Amendment. *Helling v. McKinney*, 509 U.S. 25, 33 (1993). Courts cannot deny relief to inmates living in unsafe conditions “on the ground that nothing yet ha[s] happened to them.” *Id.* Nor can they “ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year.” *Id.* The Supreme Court has explicitly recognized that the risk of contracting a communicable disease may constitute an “unsafe, life-threatening condition” that threatens “reasonable safety.” *Id.* at 33-34. Thus, “the mingling of inmates with serious contagious diseases with other inmates” violates the Eighth Amendment. *Id.* at 34 (citing *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974)); *see also Hutto v. Finney*, 437 U.S. 678, 682 (1978).

Where a person is detained prior to trial, the Due Process Clauses of the federal and Colorado constitutions provide at least as much protection. *See* U.S. Const. Amends V, XIV; Colo. Const. art. II, § 25. Before trial, a person may not suffer any “punishment.” *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979). If placing an inmate in a situation creating an elevated risk of potentially lethal infection violates the Eight Amendment, then placing a pretrial detainee in the same situation violates due process. *See Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982) (“If it is cruel and unusual punishment to hold convicted criminals in unsafe

conditions, it must be unconstitutional to confine [those who have not been convicted of a crime]—who may not be punished at all—in unsafe conditions.”).

Reducing jail populations is necessary to protect inmates’ constitutional right to reasonable safety from contracting a dangerous, highly contagious communicable disease. Indeed, the *only* way to allow inmates to practice the most effective method of avoiding infection—physical distancing—is for jails reduce their populations. Those who are released will be able to protect themselves through social distancing. Those who remain in custody will be held in safer, less densely populated jails. *See* Attachment A (Letter from Dr. Franco-Paredes).

II. This Court has authority to provide the requested relief.

This Court has authority to take the actions requested in this petition pursuant to its superintending powers over lower courts, Colo. Const. art. VI, § 2, its power to issue writs, Colo. Const. art. VI, § 3, and its rule-making authority, Colo. Const. art. VI, § 21.

As part of its superintending powers over lower courts, this Court has authority to set policy for Colorado’s judicial system. *Office of the State Court Administrator v. Background Information Services, Inc.*, 994 P.2d 420, 431 (Colo. 1999); *Bye v. District Court*, 701 P.2d 56, 59 (Colo. 1985).

As part of its power to issue writs, this Court may issue writs of mandamus ordering lower courts to act. *People in Interest of T.T.*, 442 P.3d 851, 855 (Colo. 2019); *People v. Baker*, 104 P.3d 893, 894 (Colo. 2005); *People v. Ostuni*, 58 P.3d 531, 533 (Colo. 2002); *see also Supervisory and Advisory Mandamus Under the All Writs Act*, 86 Harv. L. Rev. 595, 613-19 (1973) (describing the development of mandamus case law in the federal courts and explaining that this case law endorses a form of “advisory mandamus” that allows higher courts to settle novel and important questions of law and “lay down general guidelines settling many of the questions that surround the novel issue”).

This Court can also issue writs of habeas corpus to remedy illegal confinement. § 13-45-101(1), C.R.S.; *Graham v. Colorado Department of Corrections*, 455 P.3d 776, 778 (Colo. 2020); *Horton v. Suthers*, 43 P.3d 611, 616 (Colo. 2002). Release from custody is appropriate under a writ of habeas corpus where “the original imprisonment was lawful, yet by some act, omission, or event which has subsequently taken place, the party has become entitled to his discharge.” § 13-45-103(2)(b), C.R.S. (2019); *see also Horton*, 43 P.3d at 616 (“[T]he allegation that a petitioner is entitled to immediate release has been recognized by this court as a proper basis for petitioning for the writ.”).

Similarly, the common law writ of *audita querela* allows a party to “challenge a judgment that was correct at the time rendered but which is rendered infirm by matters which arise after its rendition.” *United States v. Torres*, 282 F.3d 1241, 1245 n.6 (10th Cir. 2002) (internal quotes omitted); *see also* Ira P. Robbins, *The Revitalization of the Common-Law Civil Writ of Audita Querela as a Postconviction Remedy in Criminal Cases: The Immigration Context and Beyond*, 6 Geo. Immigr. L.J. 643, 654 (1992); C.A.R. 21(a)(2) (allowing this Court to issue “other forms of writs cognizable under the common law”).

Finally, this Court has authority to “promulgate rules governing practice and procedure in . . . criminal cases.” Colo. Const. art. VI, § 21.

Together, these powers allow this Court to direct Colorado’s lower courts to take steps to reduce jail populations in response to the COVID-19 crisis.

REQUESTS FOR RELIEF

I. This Court should direct trial courts to take steps to reduce the number of arrests.

As Governor Polis has recommended, judges, prosecutors, and law enforcement should work together to “issue a summons instead of a warrant where there is no clear risk of physical harm to other or the community, except where otherwise prohibited by statute.” Governor Jared Polis, *Guidance to Counties*,

Municipalities, Law Enforcement Agencies, and Detention Centers, p 2, ¶¶ 2-3 (Mar. 24, 2020).

Pursuant to its superintending and rule-making authority, this Court should direct trial courts to keep people out of jail by reducing the number of arrests “where there is no clear risk of physical harm.” *Id.* Trial courts can accomplish this in several ways, including:

- Issuing a summons “in lieu of an arrest warrant” in most felony cases. *See* Crim. P. 4(a)(3). Even when the State requests a warrant, the court should instead issue a summons unless (1) the defendant is charged with a class 1, 2, or 3 felony or a level 1 or 2 drug felony or (2) a law enforcement officer presents “in writing” a basis to believe there is a “significant risk of flight or that the victim’s or public’s safety will be compromised.” *Id.*; § 16-5-206(1), C.R.S.
- When a warrant is required under Rule 4(a)(3) and section 16-5-206(1), preventing unnecessary pretrial detention by setting a personal recognizance bond when permissible or a bond with an immediately affordable secured monetary condition. *See* § 16-4-104(1), C.R.S. The bond type and amount must be stated on the warrant. *See* Crim. P. 4(b)(1)(IV); § 16-5-205(1).

- Refusing to issue arrest warrants in misdemeanor and petty offense cases where charges are filed without an arrest. Courts must issue a summons in such cases. *See* Crim. P. 4.1.
- When arrest warrants are executed, insisting police officers take the arrestee “without unnecessary delay before the *nearest* judge of a court of record” for a prompt bail hearing. Crim. P. 4.2; Crim. P. 5(a)(1) & (3) (felony provisions); Crim. P. 5(c)(1) & (3) (misdemeanor provisions); *see* § 16-3-108, C.R.S. Without an order from this Court, when the “nearest available” court is *not* the one that issued the warrant, the arrestee “routinely will be held without bond until transported to the issuing jurisdiction.” David R. Juarez, *The Use of “No Bond” Holds in Colorado*, 23 Colo. Law. 81, 82, 2003 WL 23205497 (Nov. 2003). This prolonged no-bond detention is always illegal. *People v. Garcia*, 746 P.2d 560, 563 (Colo. 1987). During the COVID-19 crisis, these routine violations of Rule 5 will violate defendants’ right to due process. *See* Argument I, *supra*.
- Refusing to issue arrest warrants for technical violations of probation and deferred sentences unless the probation officer or district attorney proves “the arrest of the probationer is reasonably necessary.” § 16-11-205(6),

C.R.S. (probation); § 18-1.3-102(4), C.R.S. (deferred sentence). “Necessary” means “absolutely needed.” *Mook v. Bd. of Cty. Commissioners of Summit Cty.*, 2020 CO 12, ¶ 52. In light of the health risks associated with detentions during the COVID-19 epidemic, the arrests for technical violations are neither reasonable nor “absolutely needed.” Where an arrest is not “absolutely needed,” the court should direct the State to issue a summons instead. § 16-11-205(2), C.R.S.

- Ensuring that probationers are arrested without a warrant only under the limited conditions permitted by statute. § 16-11-205(1), C.R.S. If subjected to a warrantless arrest, the probationer has the same right to bail as a person “incarcerated before trial.” § 16-11-205(3), C.R.S.
- Refusing to issue arrest warrants for violations of bond conditions. A court is never obligated to issue an arrest warrant for technical violations of bond conditions. A court “may issue a warrant commanding any peace officer to bring the defendant without unnecessary delay before he court for a hearing” to modify bond. § 16-4-109(4)(a), C.R.S. When the State believes a defendant has violated bail conditions, it should ordinarily file a motion to modify the conditions pursuant to section 16-4-109(1), C.R.S. After reasonable notice to the defendant, the court should hold an

out-of-custody hearing to decide whether to modify the conditions. § 16-4-109(3).

- Refusing to “revoke” a defendant’s pretrial bond. There is no legal authority for “revoking” pretrial bond.³⁷ *See* § 16-4-109, C.R.S. The court merely has authority to revoke a “defendant’s release . . . only long enough for reconsideration of the conditions of his bond[.]” *People v. Jones*, 2015 CO 20, ¶ 24.
- Issuing bench warrants only when required by statute and an arrest is necessary to prevent a substantial risk of harm to another or the public.
- Quashing bench warrants that have previously been issued.
- Where a court must issue a bench warrant (or cannot quash it), endorsing a personal recognizance bond on the warrant. Secured monetary conditions should be prohibited unless there is evidence of a substantial risk of harm to another or the community if the defendant is released.

Together, these actions would substantially reduce the number of people entering Colorado’s jails without compromising public safety.

³⁷ A bond “may” be “forfeited” in one circumstance: when the defendant fails to appear for court. § 16-4-105(1), C.R.S.

II. This Court should direct trial courts to reduce the pretrial jail population.

Pursuant to its superintending authority and its authority to issue writs, this Court should direct trial courts to reduce the pretrial jail population. In so doing, Colorado courts should consider the increased risk of COVID-19 transmission in a jail environment and the important role of courts in safely reducing jail populations where possible. Trial courts can and should release people incarcerated prior to trial in the following ways:

- Release new arrestees from custody at initial appearance, or at any other bail setting hearing, on personal recognizance or an immediately affordable secured monetary condition, unless the court finds the person presents a substantial risk of harm to another or to the community.
- Review the cases of all pretrial detainees held on secured monetary conditions, and impose personal recognizance bonds or immediately affordable secured monetary conditions unless the court determines that the person poses a substantial risk of harm to another or the community.

Colorado has a statutory presumption “that all persons in custody are eligible for release on bond with the appropriate and least-restrictive conditions consistent” with ensuring court appearance and public safety, and never has this been more important to enforce than during this public health crisis. § 16-4-103(4)(a), C.R.S.;

see also Colo. Const. art II, §§ 19, 20. Secured monetary conditions can only be required if “reasonable and necessary” to ensure public safety and court appearance. *See* § 16-4-104(1)(c), C.R.S. Money bail is seldom necessary to achieve those goals. “Unsecured bonds are as effective at achieving public safety as secured bonds.”³⁸ In the midst of this public health crisis, money bail undermines public safety. Keeping a presumptively innocent person in jail on an unaffordable monetary condition is neither reasonable nor necessary.

In addition, unaffordable secured monetary conditions during this public health crisis violate defendants’ constitutional rights to equal protection and due process.

First, the Equal Protection Clause prohibits the government from jailing a person solely because of poverty. *See* U.S. Const. amends. V, XIV; Colo. Const. art. II, § 25; *Bearden v. Georgia*, 461 U.S. 660, 665 (1983). This proposition applies even more forcefully to pretrial detention, where a person retains the presumption of innocence. *See In re Humphrey*, 19 Cal. App. 5th 1006, 1028 (2018). It would violate equal protection for indigent people to remain incarcerated

³⁸ Michael Jones, Pretrial Justice Institute, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* (2013), available at <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=87a896e2-5ab4-8123-b044-b84fba86e131&forceDialog=0>

and face increased risk of exposure to COVID-19, while similarly situated people can purchase their freedom and go home.

Second, fundamental rights, such as the right to pretrial liberty, trigger a strict scrutiny test. They can be abridged only if the government's interest is compelling and the deprivation is narrowly tailored. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Kinsey v. Preeson*, 746 P.2d 542, 547–48 (Colo. 1987); U.S. Const. amends. V, XIV; Colo. Const. art. II, § 25. Here, the government's interest in ongoing incarceration is diminished because it proliferates the spread of COVID-19. The interest in pretrial liberty is amplified because it promotes individual and community safety. The de-facto detention order here, in light of the public health crisis, fails a strict scrutiny test and violates defendants' due process rights.

Ultimately, “[i]n our society liberty is the norm, and detention prior to trial . . . is the carefully limited exception.” *Salerno*, 481 U.S. at 755. This Court should give meaning to these words by releasing and dramatically reducing the detained pretrial population.

III. This Court should direct trial courts to reduce the population of people serving jail and work release sentences.

Pursuant to its superintending authority and its authority to issue writs, this Court should direct trial courts to reduce jail populations by reducing the number of people serving jail and work release sentences. Trial courts can and should do this in several ways, including:

- During any sentencing hearing where a period of jail or work release is a sentencing option, considering the increased risk of serious illness from COVID-19 to jail inmates (including but not limited to people who meet CDC high-risk criteria), other people in the facility, and the community as a whole.
- Substantially reducing any jail or work release sentence currently being served as a condition of probation. *See* § 18-1.3-204(4)(a), C.R.S. (2019) (“the judge may . . . alter the [probation] conditions”).
- Reconsidering all sentences eligible for reduction under Crim. P. 35(b) to allow for immediate release unless there is evidence that the person, if released, presents a substantial risk of harm to another or to the community. *See id.* (“The court may reduce a sentence on its own initiative [.]”).

- As an alternative to truncating sentences under section 18-1.3-204(4)(a) or Crim. P. 35(b), and for defendants who are not eligible for sentence reductions under those provisions, modifying jail and work release sentences to home detention, § 18-1.3-105, C.R.S., suspending the remainder of eligible sentences “upon such terms and conditions as [courts] may deem best,” § 18-1.3-401(11), C.R.S.; *People v. Schwartz*, 823 P.2d 1386, 1387 (Colo. App. 1991), or granting furloughs or stays of execution.
- Releasing or furloughing any people currently serving work release sentences because such inmates go in and out of the facility on a daily basis. This substantially increases the risk that COVID-19 will be introduced into jails, and that it will spread from jails to the community at large.

This Court should direct trial courts to take all of the above actions as soon as possible.

In addition, Petitioners ask this Court to exercise its rule-making authority to modify Crim. P. 35(b). *See* Colo. Const. art. VI, § 21. This Court has already recognized the necessity of modifying the Rules of Criminal Procedure in response to the COVID-19 crisis. It modified Crim. P. 43, which governs the presence of the

defendant, multiple times in recent weeks to create and amend a public health crisis exception to that rule.

Here, Petitioners ask this Court to modify Crim. P. 35(b) to permit the modification of sentences beyond those that are currently eligible. While this Court has held that there must be limits on courts' ability to reduce sentences to avoid infringing on the executive branch's commutation power, *People v. Smith*, 536 P.2d 820, 821-22 (Colo. 1975); *People v. Herrera*, 516 P.2d 626, 627 (Colo. 1973), consistent with this case law this Court could significantly extend the Crim. P. 35(b) time limit.

In addition, this Court could specify that defendants whose appeals are pending can seek a limited remand for a sentence reduction at any time. *See People v. Bryce*, 2020 COA 57, ¶ 1 (holding that a defendant may not seek a limited remand during appeal to file a Crim. P. 35(b) motion if more than 126 days have passed since sentencing; instead, he may file a Crim. P. 35(b) motion only after the appeal concludes). With these changes, more current inmates would be eligible for sentence reductions.

In the alternative, this Court could modify Crim. P. 35(b) to allow relief after the 126-day time limit when the governor has declared a state of emergency and has specifically authorized courts to grant relief under that rule. *See Colo. Const.*

art. IV, § 7 (“The governor shall have power to grant reprieves, commutations and pardons after conviction . . . subject to such regulations as may be prescribed by law relative to the manner of applying for pardons . . .”).

CONCLUSION

This Court should exercise its superintending authority, power to issue writs, and rule-making authority to direct trial courts to take steps to reduce jail populations in light of the COVID-19 crisis.

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CERTIFICATE OF SERVICE

I certify that, on April 3, 2020, a copy of this petition was served through E-Filing on the proposed respondents.

Nancy L. Medina

INDEX OF SUPPORTING DOCUMENTS

Attachment A: Letter from Dr. Franco-Paredes

Attachment B: Addendum to Letter from Dr. Franco-Paredes

Attachment C: Letter from Weld County Public Defender

Attachment D: Letter from El Paso County Public Defender

Attachment E: Letter from Adams County Public Defender

Attachment F: Letter from Logan County Public Defender

Attachment G: Letter from Forensic Psychologists and Professors

Attachment H: Letter from Law Professors

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