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**MEMORANDUM**

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*April 8, 2020*

*To:* Governors' Offices  
*From:* Bill McBride, Executive Director  
*Re:* Early Release from Incarceration in Response to COVID-19

**Overview**

Correctional institutions are particularly vulnerable to COVID-19 outbreaks. As part of state and local COVID-19 response efforts, officials are taking actions to mitigate the spread of the disease and protect criminal justice-involved populations and correctional staff. These measures include amending agency policy (such as policies on visitation, hand sanitizer, copays, shared spaces, etc.), following *CDC Interim Guidance on Management of COVID-19 in Correctional and Detention Facilities*, and utilizing alternatives to incarceration consistent with public safety.<sup>1</sup> As part of these broader COVID-19 correctional response efforts, state prisons and local jails are also releasing certain individuals from correctional facilities prior to the completion of their sentence.

The health and safety of the public, correctional staff, and incarcerated individuals are core considerations when deciding to release certain incarcerated individuals early. So far, most action to release incarcerated individuals in response to COVID-19 has taken place through judicial mandate or through local decision-making at county jails. Recently, some states have moved to early release as well. The following outlines mechanisms for implementing early release for certain correctional populations, provides a summary of state and local actions, identifies key provisions of release decisions, and summarizes considerations noted by states around determining these actions.

**Mechanisms for Implementing Early Release**

Actions to release incarcerated individuals early due to COVID-19 concerns have been implemented in the following ways:

- (1) By court order for individual cases or for class of individuals (issued either by the state supreme court or county);
- (2) By executive action or by administration action of correctional administrator (e.g., clemency, agency discretionary release); or
- (3) By use of existing early release programs (e.g., parole, medical release, compassionate release laws).<sup>2</sup>

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<sup>1</sup> CDC's Interim Guidance on Management of COVID-19 in Correctional and Detention Facilities (March 23, 2020), available at: <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

<sup>2</sup> To help states navigate the policy process, two law schools created lists of existing release authorities and policies that states can use to release individuals from incarceration safely:

- [State Statutory Release Powers During an Outbreak or Emergency](#) (source: UCLA Law)
- [Chart on State Executive Clemency Powers and Limitations](#) (source: NYU Law)

Through each of these measures, justice system stakeholders—including state correctional officials, the judiciary/administrative office of the courts, law enforcement, local partners (e.g., prosecutors, defense attorneys, pretrial services), victims’ services, and reentry service agencies have played a role in implementing and developing the policies around these decisions. Governors’ offices should continue to coordinate with these stakeholders to understand the impact of jail and prison releases in their states.

### **State and Local Early Release Action**

Most actions to release incarcerated individuals early have been implemented in local jails, with a focus on non-sentenced (pretrial) individuals, individuals who are medically compromised, or individuals charged with low-level, nonviolent offenses. At the state level, governors and correctional officials have encouraged efforts to reduce prison populations in response to COVID-19, calling for easing good behavior restrictions, expediting parole hearings, providing departments of correction additional discretion, utilization of clemency authority, among other actions. In addition to state and local actions, U.S. Attorney General Barr issued a memorandum to the Bureau of Prisons on March 26, 2020, outlining provisions to ensure the utilization of home confinement where appropriate.<sup>3</sup>

As of April 8, 2020, the following states and localities, have taken some action to release certain incarcerated individuals early in response to COVID-19.

#### *Statewide Prison-release Action (by executive or administrative action):*

- **North Dakota.** On March 20, the North Dakota Parole Board [released](#) 56 people in response to COVID-19. The board accelerated a number of releases to ensure enough space would be available in the event of a positive case in a facility.
- **Iowa.** On March 23, the Department of Corrections announced that it is [expediting](#) the release of close to 700 people in order to create more space and resources in facilities across the state. The Iowa Board of Parole had already determined the individuals were eligible to be released. The DOC is medically screening those that are released and ensuring the individuals have a place to stay after release.
- **Illinois.** On March 23, Governor Pritzker signed an [executive order](#) to facilitate prison releases. The order eases restrictions on early release for good behavior, eliminating a prior rule that required a 14-day notification to the State Attorney’s office.
- **Colorado.** On March 24, Governor Polis issued [guidance](#) to state and local detention centers in Colorado. Among other actions, the document instructs facilities to work with courts, law enforcement, prosecutors, and defense attorneys to reduce the number of individuals in detention safely. On March 25, Governor Polis also issued an [executive order](#) temporarily suspending certain regulatory statutes concerning criminal justice in response to COVID-19.<sup>4</sup> The order notes that no directive supersedes the rights provided to victims under the Colorado Victim Rights Act. The order outlines broad discretion for the Colorado Department of Corrections (DOC) and includes directives on temporarily suspending:
  - DOC’s duty to receive and take custody of prisoners;
  - Caps on criteria on awards of earned time credits;
  - Criteria for special needs parole;
  - The requirement for an incarcerated individual to successful complete programming;

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<sup>3</sup> Office of the Attorney General, [Memorandum for Director of Bureau Prisons, Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic](#) (March 26, 2020).

<sup>4</sup> Office of Governor Jared Polis, [Executive Order D 2020 016 Temporarily Suspending Certain Regulatory Statutes Concerning Criminal Justice](#) (March 25, 2020).



- Provisions for adjusting custody level and mixing classifications to free up beds;
- The requirements for annual appropriation transfer limits; and
- The ability to reallocate funding to the purpose of subsistence payments.
- **California.** On March 24, Governor Newsom issued an [executive order](#) to reduce the risks of COVID-19 in state correctional facilities. The order stops the intake and transfer of people to California’s prisons and youth facilities and eliminates most parole revocations. Governor Newsom also used his clemency authority to grant commutations to 21 people in state prisons. In addition, the California Department of Corrections and Rehabilitation announced a [plan](#) to accelerate the release and parole dates of more than 3,500 people in state prisons. Eligible releases include people serving sentences for nonviolent crimes who are already due to be released within 60 days. The releases are intended to increase capacity and space for social distancing in state prisons.
- **Michigan.** On March 29, Governor Whitmer signed an [executive order](#) instituting temporary COVID-19 protocols regarding the Michigan Department of Corrections. In order to mitigate the risk of the virus in county jails, the order authorizes local jails to consider the early release of certain populations, including:
  - Elderly people with chronic conditions;
  - People who are pregnant;
  - People nearing the end of their sentence;
  - Those incarcerated for a traffic violation, failure to appear, or failure to pay; and
  - People with behavioral health problems who can be diverted to treatment.
- **Kentucky.** On April 2, Governor Beshear announced a [plan](#) to commute close to 1,000 sentences to protect the lives of corrections staff and people in custody. Using his clemency authority, Governor Beshear initially commuted the sentences of 186 people deemed to be medically vulnerable to COVID-19 and plans to commute another 743 sentences of people with less than six months left on their sentences.
- **Ohio.** On April 3, Governor DeWine sent a [letter](#) to judges to recommend the early release of 38 people from prison. The criteria for releases include people who are pregnant or are recently postpartum, and people who are vulnerable to COVID-19 and have less than 120 days remaining on their sentence.
- **Indiana.** On April 3, Governor Holcomb joined with the Chief Justice, Senate President Pro Tem, and House Speaker of Indiana signed a joint [letter](#) suggesting that local officials work to safely release individuals. The criteria include low-risk juveniles and adults that can be transferred to community supervision
- **New Mexico.** On April 6, Governor Lujan Grisham issued an [executive order](#) that directed the Department of Corrections to compile a list of individuals in custody that have a sentence of less than thirty days and is not serving a sentence for a number of disqualifying crimes. The order then grants a commutation to these individuals and instructs the DOC to release them from custody.

Statewide Jail-release Actions (by court order)<sup>5</sup>:

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<sup>5</sup> State Supreme Courts are quickly adjusting court procedure in response to COVID-19. Please see the [National Center for State Courts](#) for up to date information on court actions in your state and across the nation.



- **Michigan.** On March 15, the Supreme Court of Michigan [issued](#) guidance regarding emergency measures in court operations, including the recommendation that courts should consider present public health factors when determining the conditions of releases.
- **South Carolina.** On March 16, Supreme Court Chief Justice Donald Beatty [directed](#) all magistrates, municipal judges, and summary court staff to release all persons charged with a non-capital crime, unless there is an “unreasonable danger to the community.”
- **Oregon.** On March 16, Supreme Court Chief Justice Martha L. Walters [imposed](#) restrictions on court trials and operations to minimize the spread of COVID-19. The order recommends that local courts explore alternatives to incarceration in order to keep jail populations around the state at a minimum.
- **Montana.** On March 20, Supreme Court Chief Justice Mike McGrath [sent](#) a note to state courts, requesting a review of jail rosters and the release of as many people as possible in consideration of public safety.
- **Kentucky.** On March 20, Supreme Court Chief Justice John Minton Jr. [directed](#) a message to judges and court clerks regarding the state’s response to COVID-19 in correctional facilities. Minton cited Kentucky’s overcrowded jails as a potential disaster and encouraged state courts to work with state and local officials to release defendants from jails safely.
- **Washington.** On March 20, the Supreme Court of Washington [issued](#) an order recommending local courts expedite pre-trial releases. The order also allows courts to consider the COVID-19 crisis as a material change in circumstances when considering the conditions of release.
- **Ohio.** On March 20, the Supreme Court of Ohio released [guidance](#) to local courts. The order contains a category for “Incarcerated Individuals” and recommends courts to use discretion in releasing individuals with a high-risk for being infected, as well as people incarcerated for nonviolent, misdemeanor offenses.
- **New Jersey.** On March 22, the Supreme Court of New Jersey issued an [order](#) to suspend the sentences of up to 1,000 people in jails around the state. The Office of the Public Defender, the County Prosecutors Association, the Office of the Attorney General, and the American Civil Liberties Union of New Jersey negotiated to determine the eligibility criteria for release. Potential releases include those serving a sentence as a condition of probation, a municipal court conviction, or a probation violation. After the COVID-19 emergency ends, judges can decide whether the suspended sentences should be commuted or upheld.
- **Massachusetts.** On April 3, the Supreme Court of Massachusetts issued an [order](#) that instructs judges to consider the release of pretrial detainees that have not been charged with a violent crime.

*Individual County Jail-release Actions (by court order):*

In addition, a number of county jails have made similar decisions to release early. The chart in Appendix A outlines local jurisdictions that have released individuals from county jail facilities as part of their COVID-19 response efforts. This chart identifies jurisdiction, facility, date, decision-makers, number of individuals released, and eligibility criteria for release in each jurisdiction. Please note this list is meant to provide a snapshot of local action and is not exhaustive.

**Key Provisions in State Actions for Early Release**

As part of NGA’s survey of Criminal Justice Policy Advisors (CJPA), states noted the following provisions for making release decisions in response to COVID-19:

- Allow sentence modification, furlough processes, medical parole, or use of discretionary release for low-risk individuals and persons incarcerated for low-level offenses to reduce the population.
- Release of low-risk offenders being held pre-trial without bail.



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- Release of individuals incarcerated for technical parole violations.
- Provide reentry and reintegration planning and services for all individuals being released.
- Utilize alternative solutions to incarceration, such as home electronic monitoring.
- Provide guidance on quarantine or isolation, and treatment for individuals who tested positive for COVID-19.
- Provide recommendations for local jails and local officials.<sup>6</sup>
- Work with parole boards to release those who have been granted parole with a condition of programming that can be offered on the outside.
- Consider people in high-risk age groups that are nonviolent and within two years of release.
- A temporary moratorium on county jails, so that we can quarantine for two weeks upon entry.
- A temporary suspension of the caps and criteria on earned-time credits.
- A temporary suspension of criteria or statutes for special-needs parole.
- Allow DOC to advance releases for individuals who are within six months of their parole eligibility dates.

In addition to releasing individuals currently incarcerated, officials are also considering the use of alternatives to incarceration that are consistent with public safety so to mitigate transmission of COVID-19 in detention facilities and within the community. These include provisions aimed at diverting offenders from being admitted or readmitted into jails prior to trial. This includes maximizing use of diversion programs and summonses by law enforcement, as well as rethinking revocations for technical violations for individuals under community supervision. These considerations also help to keep capacity for local jails in mind.

States can also consider creating a task force to address statewide release policies. A task force might include the CJPA and representatives from the Department of Corrections, the Department of Public Health, and the Department of Labor. The group can collaborate to create a step-by-step guide so that state agencies can be prepared for potential early releases or other policy changes in response to COVID-19.

### **Considerations for States**

In determining whether to make use of these options, jurisdictions have been making decisions by weighing the challenges and public health concerns caused by the pandemic, wellbeing, and health of incarcerated individuals and correctional staff, along with the public safety and health of the community. In doing so, government leaders and justice system stakeholders are considering a number of factors and strategies, including:

- Establishing “tiger teams” or internal task forces (e.g., governor’s office, correctional leadership, public health, department of labor) to evaluate the feasibility of accelerating releases from state correctional facilities.
- Considering the safety of staff and healthcare workers.
- Leveraging existing early release programs (e.g., parole, medical release, compassionate release laws, etc.) to expedite the release of adults and youth in correctional facilities that do not pose significant public safety risks.
- Assessing eligibility for release or release to community supervision (e.g., low-risk for re-offense, low-level or nonviolent convictions or charged offense, held pre-trial, returned for technical violations, served more than half of sentence, or has fewer than 90 days remaining of sentence, individual behavior within the institution, victims’ concerns).

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<sup>6</sup> [Virginia recommendations for local officials.](#)

- Considering the vulnerability of the population in the facility, including if the population is elderly, has underlying health conditions, or is generally at-risk.
- Understanding challenges of facility capacity and ability to limit exposure and operate within public health recommended guidelines, including whether the facility is overcrowded or presents risk factors for the spread of the virus.
- Assessing the status of outbreak currently, or projected, within the state and community (e.g., number of confirmed COVID-19 cases existing within the facility or surrounding area).
- Evaluating the ability and capacity to supervise individuals within the community (including access and availability of housing upon release).
- Assessing agencies' ability and capacity for community supervision, including access to and availability of housing, of adults and juveniles upon release.

The following includes potential reasons noted by state officials as to why early release may not currently be a part of COVID-19 response efforts:

- People that are released might be more at-risk to transmission of COVID-19 in community than in a facility, due to lack of sustainable housing and limited access to healthcare.
- Releases could facilitate the spread of COVID-19 if people are not tested prior to release.
- Correctional officials have taken other measures to implement public health recommendations and reduce risk of transmission and spread.
- Early release may impede ability to prepare individuals for reentry and conduct necessary transitional planning.
- Releases might increase the risk to public safety and victims.

### **Conclusion**

Releasing incarcerated individuals early is one method states and local correctional officials are using to protect incarcerated individuals and correctional staff from COVID-19 and mitigate the spread of the disease. These efforts are part of broader COVID-19 correctional response plans. NGA will continue to track this issue and compile lessons learned from CJPA's and other criminal justice stakeholders.

*For questions or concerns related to the contents of this memo, please contact NGA staff:*

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## Appendix A

### Sample list of Individual County Jail-release Actions (by court order):

A number of county jails have made decisions to release early as part of their COVID-19 response efforts. The below chart identifies jurisdiction, facility, date, decision-makers, number of individuals released, and eligibility criteria for release in each jurisdiction. Please note this list is meant to provide a snapshot of local action and is not exhaustive.

Early Releases in Response to COVID-19										
State	County	System	Facility	Date	Prosecutor	Sheriff	Courts	Public Defender	Number	Individual Eligibility
AL	Autauga	Jail	Autauga Metro Jail	March 18th		X	X		TBD	Lower-level crimes at the discretion of sheriff
AL	Elmore	Jail	Elmore County Jail	March 18th		X	X		TBD	Lower-level crimes at the discretion of sheriff
AL	Chilton	Jail	Chilton County Jail	March 18th		X	X		TBD	Lower-level crimes at the discretion of sheriff
CA	SF	Jail	San Francisco County Jail	March 11th	X	X	X	X	TBD	Over age of 60, underlying health conditions
CA	LA	Jail	Los Angeles County Jail	March 16th	X				600+	Less than 30 days of sentence
CA	Santa Clara	Jail	Santa Clara County Jail	March 17th		X			6	Short time left on sentence
CA	Alameda	Jail	Santa Rita County Jail	March 19th		X			314	Sentence modification and own recognizance
CO	Boulder	Jail	Boulder County Jail	March 17th	X	X	X	X	80+	Low-risk, non-violent
CO	Jefferson	Jail	Jefferson County Detention Facility	March 19th		X			TBD	Served at least 50% of their sentence
FL	Hillsborough	Jail	Hillsborough County Jail	March 19th		X			164	Low-level, non-violent
GA	Fulton	Jail	Fulton County Jail	March 20th		X			15+	Non-violent
IL	Cook	Jail	Cook County Jail	March 19th		X		X	TBD	Low-level, non-violent, vulnerable
KY	Jefferson	Jail	Jefferson County Jail	March 17th	X				110	Two lowest levels of felonies
ME	Cumberland	Jail	Cumberland County Jail	March 19th	X	X			50+	Low-level with 90 days or less on sentence
MI	Ingham	Jail	Ingham County Jail	March 20th		X			73	Low-level, served significant amount of sentence
MI	Clinton	Jail	Clinton County Jail	March 20th			X		86	Low-level, high-risk medical
NC	Mecklenberg	Jail	Mecklenberg County Jail	March 18th	X	X	X	X	45+	Low-level, vulnerable to COVID
NC	Durham	Jail	Durham County Jail	March 20th	X				22	Non-violent
NY	Queens	Jail	Rikers Island	March 20th	X				79	Low-level, underlying health conditions
OH	Hamilton	Jail	Hamilton County Jail	March 16th		X	X		TBD	Low-risk, non-violent
OH	Cuyahoga	Jail	Cuyahoga County Jail	March 20th			X		600+	Low-level, non-violent
OK	Tulsa	Jail	Tulsa County Jail	March 20th	X	X	X	X	37	Non-violent
PA	Allegheny	Jail	Allegheny County Jail	March 19th	X		X	X	189	Health problems, non-violent, cash bails
PA	Lehigh	Jail	Lehigh County Jail	March 20th	X			X	24+	Low-level, at risk for COVID
SC	Lexington	Jail	Lexington County Detention Center	March 19th			X		7	In accordance with State Supreme Court Order
SC	Berkeley	Jail	Berkeley County Jail	March 20th		X	X		30+	Completed half of sentence, 30 days left of sentence
TX	Travis	Jail	Travis County Jail	March 16th			X		97	Low-level, vulnerable, severe health issues
TX	Bexar	Jail	Bexar County Jail	March 20th		X			140	Non-violent, although 60 others were sent to prison
UT	Salt Lake	Jail	Salt Lake County Jail	March 20th	X			X	200	Non-violent, technical violations
VA	Augusta	Jail	Middle River Regional Jail	March 20th	X				TBD	Non-violent with less than 30 days of sentence
VA	Albemarle	Jail	Albemarle-Charlottesville Regional Jail	March 20th			X		32	Pre-trial, medically compromised
WA	Kitsap	Jail	Kitsap County Jail	March 18th	X	X			20	Non-violent, bail less than \$5,000



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