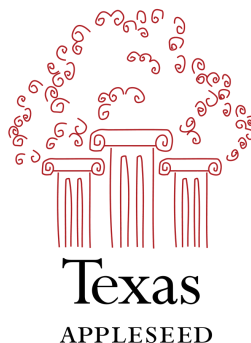




COVID-19

County Criminal Justice Stakeholder Toolkit

April 2020
Last updated April 6, 2020



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INTRODUCTION

The World Health Organization (“WHO”) and the Centers for Disease Control and Prevention (“CDC”) have identified correctional facilities as particularly vulnerable environments for a COVID-19 outbreak and attendant public health crisis.¹ Transmission of the novel coronavirus within a correctional facility would not only be more rapid and widespread both in the facility and the surrounding community, but the impact on individuals who contract the virus would be more severe given the medical vulnerabilities in the confined population. An outbreak within a jail could quickly overwhelm local hospitals, making medical care less available to everyone in the community who needs it. Moreover, both the WHO and the CDC have identified the threat of unrest within correctional facilities as an additional danger posed by the COVID-19 crisis.²

This toolkit aims to help counties confront and possibly avoid this impending public health crisis in their local jails. If adopted, the recommendations in this toolkit will not only help protect the people confined in the jails and the people who work in jails and law enforcement; they will also help reduce spread within the broader community and an overburdening of community healthcare resources.³

¹ This is for five main reasons: 1) “there are many opportunities for COVID-10 to be introduced into a correctional or detention facility, including daily staff ingress and egress,” Centers for Disease Control and Prevention, Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities (Mar. 23, 2020), *available at* <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (“CDC Guidance”), and jail bookings; 2) due to the unavoidable close proximity of staff and people housed in the facility, correctional facilities are more susceptible to amplified transmission, which would spill into the surrounding communities, World Health Organization, Preparedness, prevention, and control of COVID-19 in prisons and other places of detention, Interim Guidance 1 (Mar. 15, 2020), *available at* http://www.euro.who.int/_data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf?ua=1 (“Jails and similar settings where people are gathered in close proximity may act as a source of infection, amplification and spread of infectious diseases within and beyond prisons”); 3) “people in prisons typically have a greater underlying burden of disease and worse health conditions than the general population,” CDC Guidance; 4) “incarcerated persons may hesitate to report symptoms of COVID-19 or seek medical care due to co-pay requirements and fear of isolation,” CDC Guidance; and 5) people do not have regular access to soap and other sanitizing agents, CDC Guidance. See also The Hackett Center for Mental Health & Meadows Mental Health Policy Institute, COVID-19 Response Briefings – Jail Diversion / Admission Considerations for Texas Counties 1 (Mar. 24, 2020), *available at* <https://www.texasstateofmind.org/uploads/whitepapers/COVIDJailDiversion.pdf> (identifying the county jail as the potential “hot spot” for counties).

² CDC Guidance; WHO Guidance at 1; Keri Blakinger, *Coronavirus restrictions stoke tensions in lock-ups across U.S.*, The Marshall Project, Apr. 2, 2020, *available at* https://www.themarshallproject.org/2020/04/02/coronavirus-restrictions-stoke-tensions-in-lock-ups-across-u-s?utm_medium=email&utm_campaign=newsletter&utm_source=opening-statement&utm_term=newsletter-20200402-1911&utm_source=The+Marshall+Project+Newsletter&utm_campaign=697cf29e36-EMAIL_CAMPAIGN_2020_04_02_11_49&utm_medium=email&utm_term=0_5e02cdad9d-697cf29e36-174308453. During the COVID-19 crisis in Italy, the media reported unrest in correctional facilities due to prison conditions and restrictions from the coronavirus pandemic. See, e.g. Angelo Amante & Stephen Jewkes, *Seven dead as coronavirus measures trigger prison riots across Italy*, Reuters, Mar. 9, 2020, *available at* <https://www.reuters.com/article/us-health-coronavirus-italy-prisons/seven-dead-as-coronavirus-measures-trigger-prison-riots-across-italy-idUSKBN20W1JP>.

³ Sandhya Kajeepeta & Seth J. Prins, *Why coronavirus in jails should concern all of us*, The Appeal, Mar. 24, 2020, *available at* <https://theappeal.org/coronavirus-jails-public-health/> (“Substantial epidemiological research shows that mass incarceration raises contagion rates for infectious disease—both for people in jails, and for the community at large.”).

To avert this looming public health crisis, we identify three goals local criminal legal system stakeholders should work toward:

- 1) Safely reduce the current jail population;
- 2) Reduce the spread of the virus in the jail and in the community; and
- 3) Promote safety for those who remain incarcerated.

The premise behind the first goal is that no jail can be fully protected from COVID-19 entering the facility or being transmitted within its walls. The spread of the virus can only be halted by isolating individuals or small groups of individuals from others, which is virtually impossible in a jail environment. The local emergency and shelter-in-place orders that are being issued across Texas cannot be complied with in a jail. Therefore, to protect the jail population, the people who work within it and the wider community from outbreak within and from the jail, depopulation prior to an outbreak is the most effective response.

The premise behind the second goal is that the tinder-box danger of a jail for outbreak has not only to do with the confinement of the people within it, but also with the churn of people in and out of the jail. People arrested on new offenses are admitted daily. People held on low-level offenses will often be released within days. Employees go in and out. This churn creates many opportunities for transmission, and must be reduced as much as possible.

Finally, the third goal acknowledges that most jurisdictions will continue to jail people—even once they reduce their population significantly—and should take all steps possible to protect the people within the jail, including both people detained and jail staff, and the wider community.

Each actor in the local criminal legal system has a role to play in working toward these goals. This guide identifies strategies based in the respective legal authority of each actor and precedent in various jurisdictions for the stakeholders to work toward the overarching goal of community health through avoiding transmission of COVID-19 in local jails and criminal legal systems.

On March 29, 2020, Governor Greg Abbott released Executive Order GA-13 “relating to detention in county and municipal jails during the COVID-19 disaster.” The Order intended to override numerous state laws related to release from jail in certain circumstances. The limitations purportedly established by Executive Order GA-13 have been incorporated into this toolkit, and the strategies suggested are in compliance with the Order. A closer examination of the Order in its entirety is provided as an Appendix at the end of this toolkit.

SHERIFFS

As the person responsible for operating the jail, the sheriff has the most insight into the risks of COVID-19 spreading in the jail and how factors such as crowding, lack of access to soap and sanitizers, a particularly vulnerable population and poor access to medical care would compound to significantly increase the chances of viral transmission and serious illness or death. The sheriff should undertake the following strategies to avoid the spread of COVID-19 within the jail and broader community.

a. Goal: Reduce the jail population

i. **Strategy #1: Release people through accelerated time credits.**

The sheriff may accelerate the time a person who has been convicted is required to serve in jail through good time and work time credits under Article 42.032 of the Texas Code of Criminal Procedure. With Executive Order GA-13, Governor Abbott prohibited the release on good time or other credit pursuant to Article 42.032 of anyone serving a sentence for a crime involving physical violence or the threat of physical violence, or who has previously been convicted of such an offense at any time in the past.⁴ Sheriffs should use their discretion to apply good time credits to all people serving sentences in the jail who are not covered by Executive Order GA-13, and especially for people confined who are at higher risk for severe illness.

Moreover, the sheriff should send a list of people who they would otherwise release pursuant to good time credit but for Executive Order GA-13 to the county criminal court judges, who have the authority to convert the sentences of people covered by the Order from jail to electronic monitoring for “health or medical reasons,” so long as notice is given to the District Attorney along with an opportunity for a hearing.

ii. **Strategy #2: Assist prosecutors, judges and defense attorneys in identifying people who should be released and advocate for and coordinate release.**

In some cases, the sheriff operating the jail will not have the authority to authorize release. However, the sheriff and their staff have access to information that will be essential in determining whose release to prioritize, such as any health conditions, whether the person would pose a threat to the community, and how much time left in the person’s sentence. The sheriff should regularly review the list of people in jail and forward to the appropriate authority recommendations for release, and then coordinate with other stakeholders including judges, prosecutors, and public defenders to facilitate immediate release.

For example, in Harris County, the sheriff is working with stakeholders to identify people for “compassionate release,” calling for “reducing the population strategically in a way that targets our most at-risk inmates who are

⁴ Note that Executive Order GA-13 does not prevent the accumulation of good time credit for such individuals but just their release on good time credit during the pendency of the order.

nonviolent.”⁵ By working with other stakeholders who would have the authority to release people confined, the sheriff can play a key role in safely reducing the jail population. Even Executive Order GA-13 is clear that any county criminal court judge, district judge or appellate judge retains existing statutory authority to release anyone otherwise covered by the order for medical or health reasons, provided that the District Attorney is first given notice and the opportunity for a hearing.

Sheriffs should also review their jail lists to identify people being held for class C misdemeanors or for nonpayment of child support and notify the civil courts, justice of the peace courts, and municipal courts –some of which may not realize their orders are contributing to the jail population.

Finally, sheriffs should keep an eye out for people who are being held past the time limits mandated in Article 17.151 of the Code of Criminal Procedure. While Executive Order GA-13 suspends the automatic release on personal bond under Article 17.151, providing the District Attorney and judges with lists of people held past the time frames established in state statute will help to identify people potentially experiencing unreasonable delays in prosecution of their cases. Even if not eligible for automatic release pursuant to Article 17.151, a judge should still consider whether release on personal bond or a lower bond amount is appropriate for these individuals given the delay.

b. Goal: Minimize the risk of spread within the jail and the wider community

By reducing the daily churn of the criminal legal system, both by reducing people going in and out of the jail and reducing criminal legal contact and court appearances, opportunities for transmission of the virus will be minimized.

i. Strategy #1: Issue citations in lieu of booking for citation-eligible offenses.

Under Texas’s “cite and release” law, certain misdemeanor offenses are eligible for citation rather than booking. Tex. Code Crim. Proc. Art. 14.06. Sheriffs should reject bookings for people who are eligible for citation, and instead instruct the arresting agency to issue a citation. The Collin County Sheriff has issued a letter encouraging law enforcement to cite rather than arrest for eligible offenses.⁶

ii. Strategy #2: Reject new arrests for non-violent offenses.

The sheriff should work with local law enforcement agencies to end custodial arrests of people for nonviolent offenses and should not book people into the jail on new arrests for nonviolent offenses. For example, the

⁵ Gabrielle Banks, *Sheriff says order for some releases at Harris County Jail is not enough*, Houston Chronicle, Mar. 23, 2020, available at <https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-order-release-of-people-arrested-on-15151417.php>.

⁶ Press Release: Collin County Sheriff’s Office and COVID-19, Mar. 26, 2020, available at <https://www.collincountytx.gov/sheriff/news/Pages/Collin-County-Sheriff%E2%80%99s-Office-and-COVID-19.aspx>; see also Jobin Panicker, *Collin County sheriff addresses jail population in fight against coronavirus*, WFAA, Mar. 12, 2020, available at <https://www.wfaa.com/article/news/local/collin-county-sheriff-addresses-jail-population-in-fight-against-virus/287-3225f225-f422-4012-a8e7-82c63579eb08>.

Jefferson County sheriff has instructed local police not to bring people to jail unless they've been arrested for violent offenses, noting that warrants can be issued at a later date for nonviolent offenses if needed.⁷

iii. Strategy #3: Reject new arrests for people who are elderly, medically vulnerable or pregnant.

The sheriff should work with law enforcement to end custodial arrests of people who are particularly vulnerable to COVID-19, including people age 55 and older, people with preexisting heart, lung, autoimmune or blood pressure conditions, and people who are pregnant.

iv. Strategy #4: Discontinue "weekend jail" programs.

"Weekend jail" programs for people to serve their sentences over a period of time on the weekends create traffic in and out of the jail on a weekly basis, increasing the chances of transmission, either through the person bringing the virus from the community into the jail or the other way around. The sheriff should limit traffic as much as possible through the jail, including by suspending weekend jail programs until local and state emergency orders are no longer in effect.

c. Goal: Promote safety for those who remain incarcerated

The sheriff is responsible for the safety of the persons confined in the county jail. Tex. Local Gov't Code § 351.041. In the face of a deadly pandemic, this responsibility is especially profound. In addition to working to significantly reduce the county jail population, the sheriff must create as safe an environment as possible in the jail to reduce the chance of transmission and to treat people who have contracted the virus.

i. Strategy #1: Institute hygiene and sanitation measures at no cost to the people confined.

The sheriff should immediately take steps to have a clean and sterile jail environment, and to give people confined in the jail some agency to exercise their own hygienic practices. This includes: providing free and readily available soap, hand sanitizer, and cleaning/disinfectant supplies for living areas; ensuring sinks are in working order, and increasing availability of hand-washing stations; and sanitizing phones, video screens and other frequently-used equipment between use.⁸ The sheriff should also implement social distancing as much as possible by requiring people to keep 6-foot distances in communal areas and avoiding people congregating in lines.⁹

⁷ Kierra Sam & Jordan James, *Jefferson County jail cancels visitation, releases some inmates amid coronavirus concerns*, 12 News Now, Mar. 18, 2020, available at <https://www.12newsnow.com/article/news/local/jefferson-county-jail-cancels-visitatio-releases-some-inmates-amid-coronavirus-concerns/502-f7e9e268-e131-46af-a478-95553f309bf8>.

⁸ For these and additional recommendations, see Michele Deitch, *Recommended Strategies for Sheriffs and Jails to Respond to the COVID-19 crisis*, LBJ School at the University of Texas at Austin (Mar. 20, 2020) available at [https://www.americanjail.org/files/Deitch--Strategies%20for%20Sheriffs%20and%20Jails%20to%20Respond%20to%20the%20COVID-19%20Crisis--3-20-20--FINAL_rev%20\(1\).pdf](https://www.americanjail.org/files/Deitch--Strategies%20for%20Sheriffs%20and%20Jails%20to%20Respond%20to%20the%20COVID-19%20Crisis--3-20-20--FINAL_rev%20(1).pdf).

⁹ See Centers for Disease Control and Prevention, *Interim US Guidance for Risk Assessment and Public Health Management of Persons with Potential Coronavirus Disease 2019 (COVID-19) Exposures: Geographic Risk and Contacts of Laboratory-confirmed Cases* (Mar. 22, 2020), available at

ii. Strategy #2: Eliminate barriers to incarcerated people seeking testing and/or medical care.

The sheriff should end all medical co-pays and provide immediate and free COVID-19 testing to any person who exhibits symptoms or who states that they have been exposed to COVID-19. For example, the sheriff in Travis County has ended medical co-pays for COVID-19 related medical care.

iii. Strategy #3: Create isolation and medical care plans for people who have been tested for or diagnosed with COVID-19.

The sheriff should partner with medical professionals and public health officials to create plans for quarantining people who have been exposed to the virus, isolating people who have contracted the virus, and providing medical care to people with COVID-19, including a plan for emergency medical care.

iv. Strategy #4: Require staff who may have been exposed to the virus or who are experiencing symptoms to stay home.

The sheriff should be on high alert for potential transmission from staff to people confined in the jail. Staff who exhibit symptoms or may have been exposed to the virus should be required to stay home for 14 days from exposure or until symptoms have subsided for at least 72 hours. The sheriff should have back-up staffing plans in the event the jail is short-staffed due to illness or COVID-19 precautions.

v. Strategy #5: Mitigate harm from any restrictive measures.

Jails should restrict ingress and egress from the jail, which will likely limit visits from family members and jail programming. The sheriff should mitigate any damage done by such restrictive measures by lifting any financial barriers to phone calls or letters to and from the outside, providing alternatives to programming such as books or virtual learning, and making mental health services readily available to people who are experiencing mental health challenges due to the COVID-19 threat or related restrictions.

<https://www.cdc.gov/coronavirus/2019-ncov/php/risk-assessment.html> (defining social distancing as “remaining out of congregate settings, avoiding mass gatherings, and maintaining distance (approximately 6 feet or 2 meters) from others when possible”).

LAW ENFORCEMENT

As the actors on the front-end of the criminal legal system, law enforcement have significant discretion in deciding how to police and who to arrest. During this crisis, they should use this discretion to limit contact with individuals in the community and only initiate contact if necessary to protect a person's safety. This will help reduce the jail population and reduce opportunities for person-to-person transmission within the legal system and greater community. It will also limit law enforcement officers' exposure to the disease and protect against officer staffing shortages. Many law enforcement agencies across the state are exercising this discretion to not arrest for non-violent offenses, including sheriffs in Collin County, Jefferson County, Bexar County, Harris County and Travis County.

a. **Goal: Minimize the risk of spread within the jail and the wider community**

i. **Strategy #1: Implement cite and release for all eligible offenses.**

To minimize jail bookings, law enforcement should "cite and release" for all eligible offenses pursuant to Tex. Code Crim. Proc. Art. 14.06. For example, the Collin County Sheriff has issued a letter encouraging law enforcement to cite rather than arrest for eligible offenses.¹⁰

ii. **Strategy #2: Only arrest where a person poses an imminent danger.**

During a public health crisis, public safety is better served by minimizing contact with the criminal legal system rather than creating unnecessary opportunities for transmission. Law enforcement should only initiate arrests where a person poses an imminent danger to another person. The Bexar County Sheriff's Office is "work[ing] to minimize custodial arrests by filing non-violent offenses at large."¹¹

iii. **Strategy #3: Minimize contact between law enforcement and community.**

There is virtual consensus in the medical community that social distancing is the only way to limit the spread of COVID-19,¹² and authorities have recommended and required avoiding gatherings of 10 or more people and keeping a distance of 6 feet between people.¹³ Increasingly, local Texas jurisdictions are ordering limitations of gatherings and even shelter-in-place. Law enforcement should only respond to emergency calls that require immediate attention and when taking those calls avoid physical contact with others.

¹⁰ Jobin Panicker, *Collin County sheriff addresses jail population in fight against coronavirus*, WFAA, Mar. 12, 2020, available at <https://www.wfaa.com/article/news/local/collin-county-sheriff-addresses-jail-population-in-fight-against-virus/287-3225f225-f422-4012-a8e7-82c63579eb08>.

¹¹ Bexar County Sheriff's Office, *Bexar County Sheriff's Office COVID-19 Mitigation Plan*, available at <https://www.bexar.org/DocumentCenter/View/26179/Memo-From-Bexar-County-Sheriffs-Office-COVID-19> (last visited Mar. 31, 2020).

¹² See *supra* note 9.

¹³ *Supra* note 12.

For example, the Bexar County Sheriff's Office has a policy that "BCSO will limit its contact with the public to that which are immediately necessary. Deputies are being asked not to enter private residences or businesses and deputies will be encouraged to conduct as much business as possible outside in fresh air."¹⁴

¹⁴ Courtney Friedman, *Bexar County Sheriff Announces COVID-19 prevention plan for jail inmates, deputies*, KSAT.com, Mar. 14, 2020, available at <https://www.ksat.com/news/local/2020/03/15/bexar-county-sheriff-announces-covid-19-prevention-plan-for-jail-inmates-deputies/>.

JUSTICES OF THE PEACE & MUNICIPAL COURT JUDGES

Justices of the Peace and Municipal Court judges preside over low-level criminal cases, intended to be punished by fine only, and have the discretion to divert people in their courts from arrest, jail or continued criminal legal contact. During this crisis, they should use their discretion to limit jail intakes and other criminal legal system contact. No person should be arrested or sent to jail on a class C misdemeanor warrant or *capias pro fine* (i.e., a warrant issued specifically for not paying fines), and in-person requirements such as court appearances and community service should be suspended.

a. Goal: Reduce the jail population

i. **Strategy #1: Order the release of anybody being held for Class C misdemeanors.**

In addition to suspending all warrants and *capias pro fines*, Justice of the Peace and Municipal Court judges must ensure that nobody is being held in the jail Class C misdemeanors. Any person in the jail for a fine-only offense should be immediately released without being required to pay a monetary bond pursuant to Tex. Code of Crim. Proc. 15.17(b) and ordered to appear in court at a later date.

b. Goal: Reduce the spread of the virus within the jail and the wider community

i. **Strategy #1: Recall or suspend all warrants and *capias pro fines*.**

To reduce the risk of the virus being brought into the jail, all courts need to do what they can to minimize the number of new arrestees. Municipal Court Judges and Justices of the Peace should immediately recall or suspend all warrants and *capias pro fines* and cease issuing new warrants. Examples of courts suspending warrants during this crisis include the Austin Municipal Court¹⁵ and the Collin County Justice of the Peace Courts.¹⁶

ii. **Strategy #2: Waive all community service.**

Community service in lieu of paying a fine is appropriate when the person is unable to pay in full but is able to perform community service without undue hardship. Under Tex. Code Crim. Proc. Art. 45.0491, the amount owed should be waived if the person is both unable to pay and unable to perform community service without undue hardship. At the present moment, community service presents an undue hardship for everyone since it typically

¹⁵ AustinTexas.gov, Municipal Courts, <http://austintexas.gov/department/municipal-court>.

¹⁶ Standing Order Regarding Coronavirus (COVID-19) Mitigation to all Collin County Justice Courts Court Order No. 01, Collin County Justice Courts, *available at* https://cf30f2cb-8cdd-4967-beb4-e87d9b89a28c.filesusr.com/ugd/3556ef_1ef6fccc36de4c189152f21577c29e1e.pdf.

requires travel and contact between people, and indeed makes us all unsafe. Therefore, community service requirements should be waived.

iii. Strategy #3: Lift all OmniBase license holds.

Many counties and cities currently participate in the OmniBase program, which puts holds on renewal of people's licenses if they miss a court date or fail to pay fines and costs. This traps them in a cycle of debt, and makes it likely that they will eventually end up in being arrested for driving with an invalid license. In addition, public transportation is very dangerous at this time and has a high risk for community spread. People should have their license holds lifted so that they can safely get to the grocery store and access medical care during this crisis. By order of the Governor, the Texas Department of Public Safety has extended the renewal deadline for all licenses that expired on or after March 13, 2020. However, licenses that expired before this period are not impacted and must be renewed in order for people to drive legally. Lifting OmniBase holds will allow many people to renew their licenses and minimize use of public transportation. Municipal Court judges and Justices of the Peace should lift all current holds.

iv. Strategy #4: Postpone court appearances and payment plans.

After Municipal Courts and Justices of the Peace have recalled or suspended all warrants and lifted their OmniBase license holds, the courts should postpone all court appearances and payment plans until this crisis is over.

MAGISTRATE JUDGES

Magistrate judges make initial bail and bond determinations, and in this role have the ability to stem the tide of jail admissions. They are constitutionally required to make individualized bail decisions, and should release all people on personal bond who are eligible for release and do not pose an immediate risk to public safety. In no circumstances should inability to pay cash bail be the only reason a person is held in jail pretrial.

a. Goal: Reduce the jail population

i. **Strategy #1: Prioritize maximizing personal bonds for people being held pretrial or due to technical violations of probation or parole.**

Detaining a person in jail increases his or her risk of exposure as well as the risk of community spread when the individual is released. Magistrate judges should issue personal bonds to the greatest extent under the law to anyone charged with misdemeanors, state jail felonies, non-violent felonies, and anyone who can be released without posing an imminent threat to any reasonably identifiable person. See Tex. Code Crim. P. Art. 17.03(a) (with some exceptions, magistrates may, in their discretion, release defendants on a personal bond without sureties or other security).

Pursuant to Executive Order GA-13, magistrate judges may not release anyone on personal bond who is presently charged with or has previously been convicted of an offense involving physical violence or the threat of physical violence. If personal bond is not allowed pursuant to the Order, but the magistrate has determined the person does not pose an immediate risk to public safety and should be released, setting a secured bond at an amount the person can certainly afford is an alternative way to ensure their release from jail while awaiting trial. Texas Code of Criminal Procedure article 17.15, which provides the rules for setting the amount of secured bail, does not provide any minimum amount of bail that must be required. There are also limited circumstances under Texas law by which magistrate judges can release a person without any bond at all (i.e., release on personal recognizance or “PR” bond), such as release without bond pursuant to Tex. Code of Crim. Pro. Art. 15.17(b) when a person is charged with a fine-only offense. For a person charged with a fine-only offense, examination into past criminal history is not necessary, given that only personal bonds issued pursuant to article 17.03 and not personal recognizance bonds are covered by Executive Order GA-13.

Finally, Executive Order GA-13 has a medical or health exemption allowing a county court at law, district court or appellate court judge to release people otherwise ineligible for personal bond for health or medical reasons provided notice is given to the District Attorney and an opportunity for a hearing. Magistrates should work with jail staff to ensure people are screened for medical vulnerabilities for possible eligibility for a personal bond even if they have been charged with or previously convicted of an offense involving physical violence or the threat of physical violence.

Magistrates should also grant personal bonds to people being held for technical violations of probation, and to

people being held on blue warrants due to technical violations of parole whenever they are eligible under Tex. Gov't Code § 508.254(d).

ii. Strategy #2: Eliminate in-person supervision requirements.

Individuals should not be forced to endanger themselves and others to attend an in-person check-in or to adhere to random drug or alcohol testing under penalty of incarceration for failing to show up. This unnecessary travel and public interaction contradicts public health advice to stay home and avoid unnecessary public outings. Magistrate judges should not impose conditions of release that require the defendant to do in-person check-ins, drug tests, or to take other actions that require contact with other people. Additionally, because the virus is causing extreme economic hardship for many people, magistrate judges should not impose conditions of release that impose a financial cost on defendants. Any current in-person check-in requirements should be suspended.

Examples of counties that have eliminated or limited use of in-person pretrial supervision check-ins include Travis County, El Paso County, and Bexar County.

iii. Strategy #3: Issue summonses in lieu of arrest warrants.

In any case where a warrant may be issued, magistrate judges should issue a summons instead. See Tex. Code Crim. P. Art. 15.03(b) (“A summons may be issued in any case where a warrant may be issued, and shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate at a stated time and place.”). Magistrate judges should also allow individuals who have been summoned to appear through electronic broadcast system. Tex. Code Crim. P. Art. 15.03(c) (“[A] person may appear before the magistrate in person or the person’s image may be presented to the magistrate through an electronic broadcast system.”).

CRIMINAL COURT JUDGES

Around 70% of the population of people being held in Texas jails are detained pretrial, meaning they have not been convicted of the charge for which they are being held. Criminal court judges have enormous discretion to release people from the jail who are detained pretrial on personal bond or affordable bail. Judges should work to release all people who pose no immediate public safety risk or who are medically vulnerable.

a. Goal: Reduce the jail population

i. **Strategy #1: Implement an Emergency General Order granting immediate release on personal bond for categories of low-risk detainees.**

Judges should implement an Emergency General Order to immediately release all of the following people:

- People being held in jail pretrial for non-violent offenses, including non-violent felony offenses, so long as they have no previous conviction of an offense involving physical violence or the threat of physical violence; and
- People awaiting revocation hearings for technical violations of community supervision. These hearings should be postponed for as long as the Disaster Declaration remains in effect.

For example, the Harris County District Courts entered an order “in an effort to stem the tide of accused citizens being admitted to the Harris County Jail” under which people arrested for low-level felony offenses will be released on personal bond swiftly and without having to wait to see a magistrate.¹⁷ The Nueces County district and county court judges similarly adopted a standing order granting appointed magistrates the authority to issue personal bonds or reduce the bond amounts for anyone charged with certain felonies, as well as to reinstate the bonds of anyone arrested for failure to appear in a misdemeanor or felony case.¹⁸

ii. **Strategy #2: Work with other stakeholders to identify people for release.**

Judges should work with defense attorneys, the Sheriff, the District Attorney, the County Attorney, and Pretrial Services to identify and release all persons who would not pose an immediate threat if released, either with or without monitoring conditions. In Hays County, “members of the Hays County Adult Community Supervision Department are screening the jail roster to identify those arrestees who may pose relatively lesser degrees of risk

¹⁷ Gabrielle Banks, Sheriff says order for some releases at Harris County jail is not enough, *Houston Chronicle* (Mar. 23, 2020), available at <https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-order-release-of-people-arrested-on-15151417.php>; Harris County District Courts General Order Bond (Mar. 20, 2020) available at <https://www.justex.net/JustexDocuments/0/News%20Items/News%202020/General%20Order%20Bond%2020May2020.pdf>

¹⁸ Nueces County District Courts and County Courts at Law, Amended Standing Order Regarding Magistrates’ Authority to Issue Personal Recognizance Bonds (Mar. 17, 2020) available at <https://drive.google.com/file/d/12GqfcYVK9PQRKdSPXYCypbu5WZ0aBRmk/view>.

to our population and the community for the District Judges to review and consider for potential release.”¹⁹ Courts should also call on their Commissioners Court to approve all necessary funding for free monitoring and other services.

iii. Strategy #3: Maximize issuance of personal bonds.

Issue personal bonds to anyone charged with misdemeanors, state jail felonies, non-violent felonies, and anyone who can be released without posing an imminent threat to any reasonably identifiable person, unless the person was charged with or has previously been convicted of an offense involving physical violence or the threat of physical violence pursuant to Executive Order GA-13. County court-at-law and district judges in Harris and Travis Counties have issued general order bonds to facilitate release of most people charged with misdemeanors and non-violent felonies. For people not released on a general order bond, judges should make individualized determinations whether the person detained is a threat to the safety of an individual, and release on personal bond and/or with monitoring conditions if release would not pose a threat.

While Executive Order GA-13 generally prevents release on personal bond for anyone presently charged with or has previously been convicted of an offense involving physical violence or the threat of physical violence, until the expiration of the Executive Order, county criminal court judges, district judges and appellate judges can still order release on personal bond for “health and medical reasons,” provided notice is given to the District Attorney and there is an opportunity for a hearing.²⁰ Further, setting a secured bond at an amount the person can afford is an alternative way to ensure their release from jail. Code of Criminal Procedure article 17.15, which provides the rules for setting the amount of bail, does not provide any minimum amount of secured bail that must be required. There are also limited circumstances under Texas law by which magistrate judges can release a person without any bond at all (i.e., release on personal recognizance or “PR” bond), such as release without bond pursuant to CCP article 15.17(b) when a person is charged with a fine-only offense. For a person charged with a fine-only offense, examination into past criminal history is not necessary, given that only personal bonds and not personal recognizance bonds are covered by Executive Order GA-13.

iv. Strategy #4: Limit new custodial sentences.

For people who have been convicted, judges should limit custodial sentences as much as possible. Where confinement is absolutely necessary, transition new incarceration to house arrests. When imposing a custodial sentence, consider whether the safety imperative of custodial detention outweighs the mortality and infection risk of spreading COVID-19 within jails and prisons. While Executive Order GA-13 generally prohibits electronic monitoring sentences for people currently serving a sentence or previously convicted of a crime involving physical violence or the threat of physical violence, a judge can consider such a sentence for “health or medical reasons,” provided that the District Attorney is given notice and the opportunity for a hearing.

¹⁹ Stephanie Gates, County Releases Inmates To Prevent Coronavirus Spread, San Marcos Daily Record (Mar. 27, 2020), available at <https://www.sanmarcosrecord.com/news/county-releases-inmates-prevent-coronavirus-spread>.

²⁰ Executive Order GA-13 provides: “nothing herein shall prevent the lawful exercise of authority by a county criminal court judge, district judge, or appellate judge in considering release on an individualized basis for health or medical reasons, provided that proper notice is given to the district attorney and an opportunity for hearing is given.”

v. Strategy #5: Postpone sentencing report dates.

If a person has already been sentenced to a term of incarceration but has not yet reported to the jail, judges should postpone the date that the person is required to report to the facility to begin serving his or her sentence.

vi. Strategy #6: Release people already serving custodial sentences.

For people who are already serving sentences in the county jail, judges should, on the court's own motion, allow the person to serve the sentence at home under electronic monitoring, as permitted under Article 42.035 of the Texas Code of Criminal Procedure. While Executive Order GA-13 prohibits electronic monitoring sentences for people currently serving a sentence or previously convicted of a crime involving physical violence or the threat of physical violence, the judge can consider such a sentence for "health or medical" reasons, provided that the District Attorney is given notice and the opportunity for a hearing.

vii. Strategy #7: Maximize outpatient competency restoration.

Under Tex. Code Crim. Proc. Articles 46B.0711 and 46B.072, courts must release on bail people determined to be incompetent to stand trial on a Class B or Class A misdemeanor, and who do not pose a danger to others. The individual must be treated in an appropriate outpatient competency restoration program, and the court must receive a comprehensive treatment plan from the individual. Courts may also place people who do not pose a danger to others, and who are charged with felony offenses, into outpatient competency restoration programs so long as the conditions described above are satisfied. Given the danger of extended periods of detention required for jail-based competency restoration, or delays awaiting placement into hospital-based competency restoration, courts should maximize the use of outpatient competency restoration.

viii. Strategy #8: Communicate with outpatient competency restoration providers about the need to continue these programs and receive new clients.

Outpatient competency restoration programs typically have waitlists and inquiries from more potential patients than they can serve. Courts should actively communicate and coordinate with providers to continue these programs and encourage them to take on new clients.

[b. Goal: Reduce the spread of the virus within the jail and the wider community](#)

i. Strategy #1: Recall all non-priority warrants and reject new warrants for low-level felony offenses.

Judges should immediately recall or suspend all non-priority warrants, including but not limited to all warrants for all misdemeanor and non-violent offenses, such as drug offenses, theft, prostitution, tampering with evidence, and bail jumping/failure to appear. Similarly, courts should reject new warrants and cases for non-violent offenses.

The Travis County District Courts and County Courts at Law have issued standing orders suspending warrants in low-level felony cases and most misdemeanor cases.²¹ The standing orders remain in effect until May 8, 2020, at which point they will be reassessed and possibly continued.

ii. Strategy #2: Adjust supervision conditions.

For people out on bail or on community supervision, judges should adjust conditions to reduce the risk of revocation and/or community spread. Many people out on bond or serving sentences of community supervision have a number of conditions that may now pose an undue burden and increase the risk of community spread. Courts should reevaluate these conditions, especially conditions that require in-person meetings, counseling sessions, classes, or testing.

iii. Strategy #3: Postpone hearings at defense counsel's request.

At the request of defense counsel, judges should postpone any hearings, including sentencing hearings, for as long as the Disaster Declaration is in place. Courts should also postpone the dates that sentenced people who are not in custody are required to report to jail to serve their sentences.

²¹ Travis County District Courts, Amended Standing Order Temporarily Suspending the Execution of Warrants for Certain Travis County Cases (Mar. 23, 2020), available at <https://drive.google.com/file/d/1sgDcdE1NeZit2wwzh61bTakztRjuwMTM/view>.

PROSECUTING ATTORNEYS

Prosecutors around the country are scrambling to avert a COVID-19 crisis in their jails. Recently, 31 elected prosecutors from around the country, including district attorneys from Dallas County, Nueces County and Bexar County, joined in a statement released by Fair and Just Prosecution.²² The recommendations include releasing those being held on unaffordable bail as well the elderly, those with medical conditions, and those within six months of completing their sentence. The statement also calls for reducing immigrant detention populations.

a. Goal: Reduce the jail population

i. **Strategy #1: Work with defense counsel to file jointly for bail review.**

Prosecutors should file joint motions with the public defender's office or appointed counsel seeking the release of all people detained pretrial on non-violent charges because they cannot afford bail. They should jointly ask the judges to conduct bail hearings for all other people detained pretrial to reassess least-restrictive conditions in light of COVID-19 and changed circumstances.

ii. **Strategy #2: Stop pursuing non-violent misdemeanor and felony offenses.**

Prosecutors should stop pursuing non-violent misdemeanor and felony offenses and should inform law enforcement that such charges will not be prosecuted. Prosecutors should also request law enforcement to not make any such arrests for non-violent offenses. For example, the Bexar County District Attorney joined the Bexar County Sheriff in calling on the San Antonio Police Department to minimize arrests for non-violent offenses by using citations in lieu of arrest and filing non-violent charges at large.²³

iii. **Strategy #3: Seek noncustodial sentences.**

With the risk of transmission in correctional facilities, and the inability of people inside those facilities to mitigate their risk of exposure, a jail or prison sentence today carries at a minimum the extreme punishment of mental anguish and anxiety over lack of protections and isolation from loved ones, and at its most severe a risk of contracting serious illness or even dying. In the vast majority of pending or new cases, prosecutors should only seek noncustodial sentences.

²² Fair and Just Prosecution, Joint statement from elected prosecutors on COVID-19 and addressing the rights and needs of those in custody (Mar. 23, 2020), available at <https://fairandjustprosecution.org/wp-content/uploads/2020/03/Coronavirus-Sign-On-Letter.pdf>.

²³ Letter from Nelson Wolf, Joe Gonzales and Javier Salazar to Mayor Ron Nirenberg on March 16, 2020, available at <https://www.scribd.com/document/452067209/Judge-Nelson-Wolff-letter-about-jail-time-during-coronavirus-outbreak>.

b. Goal: Reduce the spread of the virus within the jail and the wider community

i. **Strategy #1: Do not seek warrants for nonappearance or bond violations (other than new law violations).**

To minimize contact between the community and law enforcement, and avoid booking and jail traffic that could threaten public health, prosecutors should not seek warrants for nonappearance or bond violations.

ii. **Strategy #2: Withdraw motions to revoke and do not seek warrants for technical violations of probation or parole.**

To avoid unnecessary contact and traffic in the criminal legal system, which would create opportunities for transmission, prosecutors should not seek warrants for technical violations of probation or parole. Motions to revoke and motions to adjudicate that were sought on the basis of technical violations should be immediately withdrawn to avoid unnecessary contact and possible opportunities for transmission. Examples of jurisdictions that are no longer moving to revoke for technical violations include Travis County and Bexar County.

LOCAL EXECUTIVES

Local executives can slow the spread of COVID-19 by limiting the potential for outbreaks in the local jail. Jails are a hotspot for the spread of COVID-19. The necessity of close quarters and shared facilities inside a jail make preventing the rapid spread of COVID-19 within them incredibly difficult. Preventing a sizable population from contracting COVID-19 will keep more hospital beds available for everyone and save community members' lives.

a. Goal: Reduce the jail population

i. **Strategy #1: Limit who can enter the jail.**

Local Government Code § 418.108(g) provides that a mayor or county judge may “control ingress to and egress from a disaster area...and control the movement of persons and the occupancy of premises in that area.” This power can be used to prevent any limit new people from being incarcerated in the local jail. Using this power this way to reduce admissions would reduce the amount of new person to person contact in the jail and help prevent the spread or introduction of COVID-19 into the local jail.

On April 1, 2020, Harris County Judge Lina Hidalgo issued an order requiring the Sheriff to release certain categories of people from the jail while the Local Disaster Declaration is in effect.²⁴ This included people who have not been charged with violent offenses and people who have not previously been convicted of violent offenses, consistent with Executive Order GA-13.

ii. **Strategy #2: Collaborate with the local sheriff to house local detainees outside of the jail.**

Texas Government Code § 351.0035 provides that if the county commissioner's court and the local sheriff request, the Texas Commission on Jail Standards “shall authorize a county to house a prisoner in a tent or other facility that is not a county jail.” TCJS can choose to develop individualized standards for the alternate facility or waive them if “compliance is not practicable or reasonable.” County executives should consider appropriate alternate facilities that would allow for proper hygiene and social distancing during the COVID-19 pandemic, including authorizing certain defendants to be detained in their homes.

b. Goal: Reduce the spread of the virus within the jail and the wider community

i. **Strategy #1: Instruct local law enforcement to limit arrests.**

Mayors can reduce churn through the local jail facility by directing the local police force to take measures to limit the person-to-person exposure in the community and in booking facilities at local jails. These measures should

²⁴ “At the time of publication, there was a dispute as to whether this order would take effect.” St. John Banned-Smith & Gabrielle Banks, Judge voids Harris County order to release jail inmates to battle coronavirus, Houston Chronicle (Apr. 3, 2020), available at [https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-Jail-releases-get-under-way-to-15177262.php?utm_campaign=CMS%20Sharing%20Tools%20\(Premium\)&utm_source=t.co&utm_medium=referral](https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-Jail-releases-get-under-way-to-15177262.php?utm_campaign=CMS%20Sharing%20Tools%20(Premium)&utm_source=t.co&utm_medium=referral).

include issuing a temporary order not to conduct custodial arrests for nonviolent offenses or on warrants for nonviolent offenses, as well as directing police to avoid conducting investigatory stops for things like minor traffic violations or other suspected nonviolent activity, unless there is an independent reason to believe that the person is an imminent threat to public safety.

In Bexar County, in an effort to reduce the number of people coming into the Bexar County jail, the County Judge, Sheriff and District Attorney recently sent a letter to the San Antonio Mayor requesting he “have the City of San Antonio Police Department minimize custodial arrests by using Cite and Release, and filing non violent offenses at large to the extent possible.” In their letter, the officials argued that “during a pandemic event [jails] can inadvertently become incubators and amplifiers for a contagious illness.”²⁵

c. Goal: Promote safety for those who remain incarcerated

i. Strategy #1: Compel through the local health authority cleaning measures in the jail and booking office.

In times of local emergency, the Local Health Authority (LHA) has the power to enact control measures over a specific area under Texas Health & Safety Code § 81.082. An LHA is an appointed official with a two year term, usually the head of the Department of Health if the county has one. The LHA can use this power to compel adequate cleaning measures in the local jail, including disinfection, decontamination, quarantine, and prevention. The LHA should consider ordering local detention facilities to provide consistent access to soap and other cleaning products for detainees, conduct regular cleaning schedules of hard surfaces within the jail facility and any booking facilities, and any other communicable disease control measures that the LHA finds necessary or appropriate. Implementing these control measures in the local jail can slow or prevent the spread of COVID-19 within the jail and help protect the most vulnerable incarcerated people.

²⁵ *Id.*

APPENDIX: SUMMARY OF EXECUTIVE ORDER GA-13

On March 29, 2020, Governor Greg Abbott issued [Executive Order GA-13 \(“the Order”\), relating to detention in county and municipal jails during the COVID-19 disaster](#). The Order purports to restrict local jurisdictions’ ability to release certain people from jail during the COVID-19 disaster by suspending state statutes relating to personal bonds and good time credits, among other things, and replacing them with the governor’s Order. Setting aside critical questions of whether the Order exceeds the governor’s authority and violates the U.S. and Texas Constitutions, the following explains local actors’ authority to release people from jail through personal bonds and other mechanisms under the plain text of the Order.

Pretrial Release on Personal Bond

Limitations Imposed By the Order

- The Order prohibits judges from releasing on personal bond anyone who is currently charged with or previously convicted of a crime that involves physical violence or the threat of physical violence. No definition of “physical violence” or “threat of physical violence” is provided. The Order speaks only to current charges and convictions for offenses involving physical violence or the threat of physical violence; hence, previous arrests, charges not resulting in conviction, and deferred adjudications are not covered by the Order.
- Under the Order, even if someone is currently charged with a nonviolent offense, a previous conviction for a crime that involved physical violence or the threat of physical violence in the past would make them ineligible for a personal bond. This means a criminal history check will be required before releasing anyone on personal bond.
- There is a health exception to these prohibitions, which is discussed below.

Continued Authority to Release People Pretrial

- If a person is not currently charged with a crime involving physical violence or the threat of physical violence, and has never been convicted of a crime involving physical violence or the threat of physical violence, judges can continue to issue personal bonds pursuant to Tex. Code of Crim. Pro. art. 17.03.
- If a person is currently charged with or has been previously convicted of a crime involving physical violence or the threat of physical violence, the Order provides one exception that may allow for their release on personal bond: a judge (specifically the county criminal court judge, district judge or an appellate judge) may release such a person on personal bond for “health or medical reasons” so long as notice is given to the district attorney and there is an opportunity for a hearing. **All people being considered for personal bond should also be asked questions relating to their medical history and vulnerability to COVID-19 during booking or other screening, so that information can be used to determine whether they would fall within the health exception if they are otherwise subject to the personal bond prohibition.**

- The Order does not impact a judge’s authority to release any person on a secured bond. Furthermore, there is no minimum monetary amount for a secured bond pursuant to Tex. Code of Crim. Pro. art. 17.15. All that is required in setting a secured bond amount is that the magistrate or judge take into account the individual factors laid out in 17.15. Therefore, judges may set low bond amounts, or even nominal bond amounts such as \$1, for people who are prohibited a personal bond by the Order but whom the judge determines should not be held in jail awaiting trial.
- The Order also does not impact a judge’s authority to release a person without any bond (meaning neither a secured bond nor an unsecured personal bond; usually referred to release on personal recognizance). For example, release without bond is allowed for fine-only offenses pursuant to Tex. Code of Crim. Pro. art. 15.17(b). Therefore, an examination of criminal history for previous violent offenses is not necessary pursuant to the Order if the person has been charged only with a fine-only offense(s).

Other Limitations on Pretrial Release in Special Circumstances

Limitations Imposed by the Order

- Pursuant to Tex. Code of Crim. Pro. art. 15.21, a person is entitled to automatic release on personal bond if they were booked into jail on an out-of-county warrant and the county in which the warrant was originally issued does not take the person into custody before the 11th day after their arrest. The Order suspends this statute, meaning a person booked into jail on an out-of-county warrant will not be automatically released on personal bond after 11 days.
- Pursuant to Tex. Code of Crim. Pro. art. 17.151, a person is automatically entitled to pretrial release, either on personal bond or by reducing the bond to an affordable amount, if the state is not ready for trial within a certain period of time (*i.e.*, 90 days for felony charge; 30 days for Class A misdemeanor charge; 15 days for Class B misdemeanor charge; 5 days for a fine-only misdemeanor charge.). The Order suspends this statute, meaning a person is not automatically eligible for pretrial release because the state is not ready for trial within the prescribed time.

Continued Authority to Release People From Jail Pretrial

- A person who would normally be entitled to *automatic* pretrial release in either of these situations is still *eligible* for release from jail pretrial; they are just not entitled to release due to the time limit being reached.
- When a judge is considering whether to release them, the same limitations on personal bonds discussed in the previous section would apply if the person is charged with or has been previously convicted of an offense involving physical violence or the threat of physical violence. Similarly, the same avenues for release discussed in the previous section remain available, including reducing the bond amount to one that the person can afford, release on their own recognizance with no bond, and release for individualized “health or medical reasons” after notice to the district attorney and an opportunity for a hearing. See above for more details.

Limitations on Release on Good Time Credit & Electronic Monitoring

Limitations Imposed By the Order

- In addition to limiting pretrial release, the Order also limits release of sentenced jail inmates as well. Specifically, it prevents the sheriff or any other authority in the county from releasing anyone on good

time credit pursuant to Tex. Code of Crim. Pro. Art. 42.032 if the person is serving a sentence for or has previously been convicted of an offense involving physical violence or the threat of physical violence.

- The Order also prevents the release from jail to serve the remainder of a sentence at home through electronic monitoring pursuant to Tex. Code of Crim. Pro. Art. 42.035 if the person is serving a sentence for or has previously been convicted of an offense involving physical violence or the threat of physical violence.

Continued Authority to Release Sentenced Inmates

- All people confined in a jail who are not serving a sentence for or previously convicted of an offense involving physical violence or the threat of physical violence are eligible for release to electronic monitoring under Art. 42.035.
- A county criminal court judge, district judge or appellate judge retains the authority to order the release of a person serving a sentence for or previously convicted of an offense involving physical violence or the threat of physical violence from jail to electronic monitoring pursuant to Tex. Code of Crim. Pro. Art. 42.035 if the judge determines the release is necessary for “health or medical reasons,” provides notice to the district attorney and the opportunity for a hearing.
- All people confined in a jail who are not serving a sentence for or previously convicted of an offense involving physical violence or the threat of physical violence are eligible for release by the sheriff on good time credit Art. 42.032.
- Good time credit will continue to accumulate during the pendency of the Order, regardless of whether the person can actually be released on good time credit pursuant to the Order.
- Defense counsel may also still file a motion for new trial or motion in arrest of judgment within 30 days of imposition of the sentence pursuant to Tex. Rules of App. Procedure 21.4 and 22.3, providing the trial court the opportunity to review and modify the verdict and/or the punishment.

Limitations on County Judges and Mayors

Limitations Imposed By the Order

- The Order prevents a mayor or county judge from overriding any part of the Order through the powers granted to them during a local disaster pursuant to Tex. Gov’t Code Ch. 418. For example, in a state of local disaster mayors and county judges have the power to “order the evacuation of all or part of the population from a stricken or threatened area” if the action is “necessary for the preservation of life or other disaster mitigation, response, or recovery.” Tex. Gov’t Code § 418.108(f). However, the Order would prevent them from exercising this authority to remove people specifically covered by the Order from the jail.

Continued Authority of County Judges and Mayors

- County judges and mayors continue to have a vital role to play in preventing the spread of COVID-19 in local jails. Many strategies within their authority are discussed in the toolkit section on “Local Executives.”