



March 26, 2020

SENT VIA Email

Dear Sheriff,

We write to urge your office to take immediate action to substantially decrease the prisoner population in your jail in order to protect staff and incarcerated people from spread of COVID-19. As you likely know, COVID-19 has already infiltrated Colorado's criminal justice system. At least three public defenders in three different counties, at least one sheriff's deputy and at least one Community Corrections participant have confirmed cases of COVID-19.¹ While there are not yet confirmed cases among Colorado inmates, this is almost certainly only because, to date, inmates are not being tested for COVID-19 in the jails.² Across the state, several jails house dozens of symptomatic inmates. One salient example is Jefferson County where the number of inmates isolated due to possible exposure to, or symptoms of, COVID-19 jumped from three to 36 in one week.³

I. Summary - *Sheriffs have a societal and constitutional obligation to decrease the jail population so that inmates and staff can practice social distancing.*

Medical experts across the country agree that jails are the ideal breeding ground for the spread of COVID-19. As Dr. Franco-Carlos, infectious disease expert at University of Colorado Anschutz, explains in the attached letter, "This epidemic has the potential to become the Common Prison Plague."⁴ It is because of this concern that Governor Polis took executive action to urge all local law enforcement, including sheriffs, to do their part to safely decrease the incarcerated population. *See Guidance to Counties, Municipalities, Law Enforcement Agencies and Detention Centers* (Mar. 24, 2020), ("Reducing the numbers of those arrested or incarcerated is vital to our efforts to limit and prevent the spread of COVID-19 in our communities, detention centers and prisons.")⁵

As detailed further below, your office not only has a societal, but also a constitutional, obligation to substantially decrease your jail population so that inmates can receive constitutionally adequate preventative and curative medical care. Constitutionally adequate medical care in this context means: (1) taking appropriate precautions to protect high-risk inmates from becoming infected with COVID-19; (2) quarantine of those inmates who are infected in a manner that does not replicate punitive solitary confinement; and (3) provision of adequate medical care to inmates who become infected. To accomplish any of these steps, the jail must sufficiently decrease its inmate population to ensure that those who remain in the jail – prisoners and staff alike – can practice social distancing at all times in the day, including during sleeping hours. In most jails, this will require, at minimum, that inmates be housed no more than one to a cell. As Dr. Franco-Paredes explains in his letter:

“To contain the spread of the disease, infection prevention protocols must be meticulously followed. These infection prevention protocols include “social distancing” measures, where individuals maintain a distance of at least six feet from each other and frequent hand-washing and other good hygiene practices. . . . In a carceral setting, these protocols would require, for example, that individuals sleep one person per cell, rather than in bunk beds.”

For jails with larger cells that typically sleep four or more inmates, single-celling may not be necessary, so long as living quarters allow inmates to sleep and use the toilet with at least six feet of distance from one another. Please note that inmates who are housed in single cells must still be permitted adequate out-of-cell time, during times when the common space is sufficiently uncrowded to allow inmates to practice social distancing.

To meet your constitutional obligations, we urge the following actions:

- 1. Immediately and safely decrease the number of people in your jail so that all inmates and correctional staff can practice social distancing, including during sleeping hours.**
 - **Create priority release lists.** Sheriffs should immediately assess their incarcerated population to identify (a) all inmates who, according to public health guidelines, are at high risk for serious illness or death if they contract the virus; (b) all inmates held in jail for technical non-compliance with court orders (such as failure to appear in court); (c) all inmates held pretrial on money bond; and (d) all sentenced inmates within 60 days of the completion of their sentence. Sheriffs should provide those lists to the court, prosecutor and public defender and ask that these inmates be considered for immediate release if release does not pose a “clear risk of physical harm to others or the community.” (Note, the concept of “clear risk of physical harm to others in the community” is taken from the Governor’s March 24 guidance.)⁶
 - **Exercise powers of release.** Sheriffs should exercise all of their powers to release those in their custody, including (a) anyone on work release, (b) anyone who has served more than 50% of their sentence and (c) anyone held on a municipal offense.
 - **Further actions to ensure constitutional compliance.** If these measures are insufficient to decrease your jail population so that prisoners, at minimum, are housed no more than one to a cell, sheriffs must release additional people. To balance public safety with public health, we offer the following recommendations for release: (a) individuals held for technical non-compliance with a court order, probation or parole and (b) people held on money bond pretrial for misdemeanor offenses, moving up to F6 and F5 offenses if necessary and if release does not pose a clear risk of physical harm to persons in the community.
- 2. Dramatically reduce new incarcerations.** Sheriffs should advise their deputies not to arrest and to refuse to take custody of people charged with the following: (a) municipal offenses; (b) technical non-compliance with a court order, probation, or parole; (c) misdemeanor offenses, including drug misdemeanors and traffic misdemeanors/traffic infractions, F6, F5, F4 and DF4 unless advisement is required

under the Victims' Rights Act; (d) people arrested on a warrant for another jurisdiction.

- 3. Dramatically limit transportation of inmates on writs.** The transportation of inmates on writs from one county jail to another and between DOC and county jails should be dramatically reduced or suspended entirely. Transport will inevitably increase the likelihood of the spread of the virus between correctional facilities by exposing inmates and corrections staff, court staff and sheriffs in multiple counties each time an inmate from one jail or prison is transported by sheriffs to another facility. Only in cases where an inmate's speedy trial rights are implicated, a bond reduction/modification will not lead to release of the inmate and the trial is set after April 3rd, 2020 should a writ be executed. In those cases, the inmate should be transported and housed in a manner that allows social distancing.

We know sheriffs are under enormous pressure to get this moment right and to do so while juggling multiple competing priorities. We recognize and appreciate that the County Sheriffs of Colorado ("CSOC") has taken steps to encourage statewide uniformity of response by sheriffs to the COVID-19 crisis by issuing guidance.⁷ CSOC guidance candidly acknowledges the reality that jail conditions are likely to allow quick internal spread of the virus, that jails house a disproportionate number of high-risk individuals who face substantially increased vulnerability to serious illness or death from the virus and that jails "face the likelihood of an exposure cycling back into the community from a detention facility."⁸ However, while this guidance contains many important provisions to reduce new arrests by sheriffs, it does not recommend any actions to reduce the current jail population. Indeed, the guidance appears to take as a given that the jail population will remain too large for inmates and presumably guards, to practice the social distancing that is required to mitigate the spread of the virus.⁹

Nonetheless, we know that many of you are already taking substantial steps to lower your jail populations and make the environment safer for all inmates and staff. Just a couple of examples that have gotten media attention: The population at the La Plata County Jail has shrunk by 36% as officials worked to release vulnerable inmates who pose a low risk to the community.¹⁰ The Jefferson County Sheriff's Office is releasing inmates who have served a minimum of 50% of their sentence for non-violent crimes that do not implicate the Victims' Rights Act, arranging in-home detention for qualifying work release inmates and avoiding low-level warrant arrests, when possible, to limit the number of new individuals booked into jail.¹¹ We are certain there are many more examples of your good work to decrease your jail populations. Indeed, we have been tracking jail populations in the largest Colorado jails and have observed that, for many, there has been a substantial decrease in the inmate population in the last week. Unfortunately, there are also a number of jails that have yet to see any substantial change to their inmate population, despite the growing crisis.

Even with these efforts, we know that many jails are still housing inmates in small cells together where they cannot practice social distancing. This means that the efforts have not yet gone far enough to meet the sheriffs' public health and constitutional obligations. The legal underpinnings for those obligations are detailed in the body of this letter below.

On a final note, we thought it may be helpful to share examples of efforts taken by sheriffs in other jurisdictions to limit their jail populations, often with the explicit goal of ensuring that each inmate has their own cell. For instance, the Hamilton County Sheriff's Office in Ohio is working with medical professionals to identify at-risk inmates and prioritize them for release. By releasing people held pretrial, the jail population has already dropped from 1,400 to 1,000, though Sheriff Jim Neil wants to reduce the number of people housed in the jail to 840 so each inmate has their own cell.¹² In Oregon, when the Washington County Sheriff's Office released 121 inmates, Sheriff Pat Garrett said, "We wanted to free up the housing unit that has dormitory type sleeping where those in custody are sleeping kind of near each other and they don't have their own cell."¹³ The Harris County Sheriff's office in Texas is seeking compassionate releases for hundreds of vulnerable inmates. Sheriff Ed Gonzalez said, "Jails and prisons are fertile ground for the spread of infectious disease. My nightmare scenario is that an outbreak happens at the county jail."¹⁴

These examples tell us that reducing the jail population so that incarcerated people are housed in a manner that allows them to practice social distancing is an achievable goal.

II. COVID-19 Poses A Grave Risk of Harm, Including Serious Illness or Death, to Persons Over Age 60 and Those with Certain Medical Conditions.

COVID-19 is a disease that has reached pandemic status.¹⁵ In only a few months, at least 482,800 people worldwide have confirmed diagnoses, including over 68,534 people in the United States.¹⁶ Over 21,896 people have died as a result of COVID-19 worldwide, including at least 990 in the United States.¹⁷ The first confirmed cases of COVID-19 in Colorado were announced on Thursday, March 5, 2020.¹⁸ As of March 26, 2020, there were 1,086 confirmed cases of COVID-19 in 36 counties in Colorado.¹⁹ 147 people have been hospitalized for COVID-19 in Colorado and 19 people have died.²⁰ Health experts agree that these numbers dramatically undercount the infected population in Colorado.²¹ Further, the infected population is expected to grow exponentially over the coming weeks and months, as are the numbers of hospitalizations and deaths.²²

The Centers for Disease Control (CDC) and the Colorado Department of Public Health and Education (CDPHE) have issued guidance regarding which populations are most at risk to serious complications or death if infected by COVID-19.²³ High-risk individuals including people over the age of sixty and those with certain medical conditions face greater chances of serious illness or death from COVID-19.²⁴ Certain underlying medical conditions increase the risk of serious COVID-19 disease for people of any age, including lung disease, heart disease, chronic liver or kidney disease (including hepatitis and dialysis patients), diabetes, epilepsy, hypertension, compromised immune systems (such as from cancer, HIV, or autoimmune disease), blood disorders (including sickle cell disease), inherited metabolic disorders, stroke, developmental delay and pregnancy.²⁵

In many people, COVID-19 causes fever, cough and shortness of breath.²⁶ But for people over the age of sixty or with medical conditions that increase the risk of serious COVID-19 infection, shortness of breath can be severe. The COVID-19 virus can severely damage lung tissue, which requires an extensive period of rehabilitation, and in some cases, can cause a permanent loss of respiratory capacity.²⁷

According to recent estimates, the fatality rate of people infected with COVID-19 is about ten times higher than a severe seasonal influenza, even in advanced countries with highly effective health care systems.²⁸ **For people in the highest risk populations, the fatality rate of COVID-19 infection is about 15 percent.**²⁹ Patients in high-risk categories who do not die from COVID-19 should expect a prolonged recovery, including the need for extensive rehabilitation for profound reconditioning, loss of digits, neurologic damage and the loss of respiratory capacity.³⁰

There is no vaccine against COVID-19, nor is there any known medication to prevent or treat infection from COVID-19. The only known effective measures to reduce the risk for high-risk individuals from serious injury or death from COVID-19 are to prevent them from being infected in the first place. Social distancing, or remaining physically separated by a distance of at least six feet from known or potentially infected individuals, and vigilant hygiene, including washing hands with soap and water, are the only known effective measures for protecting vulnerable people from COVID-19.³¹

It is for these reasons that CDC and CDPHE guidelines to prevent infection and spread require: Limiting social gatherings to 10 people and practicing social distancing, which requires maintaining at least six feet between individuals.³² For people with a positive COVID-19 test or symptoms of COVID-19, the CDPHE recommends quarantine, where the person must stay in a secure location for 14 days.³³ To prevent outbreaks, the CDC recommends jails implement strategies that focus on reinforcing hygiene practices, intensifying cleaning and disinfection of the facility, screening (new intakes, visitors and staff), continued communication with incarcerated/detained persons and staff and social distancing measures (increasing distance between individuals).³⁴ To prevent the spread of COVID-19 following an outbreak, the CDC recommends jails isolate symptomatic inmates in separate single cells.³⁵

III. Colorado's Response to COVID-19 Outbreak

The COVID-19 outbreak in Colorado has resulted in unprecedented health measures to facilitate and enforce social distancing. The State has placed restrictions on nursing homes and closed large gathering places including restaurants, coffee shops, theaters, bars, ski resorts, non-essential personal service facilities, concert halls, casinos, gyms and other large gathering places.³⁶ All public schools are closed until April 17 and the Colorado Department of Public Health and Environment announced a 30 day statewide ban on public gatherings of more than 10 people, with limited exceptions.³⁷ Additionally, the Governor ordered employers at non-critical workplaces to cut their in-person workforces by at least 50%.³⁸ Counties across Colorado including Denver, Jefferson, Douglas, Arapahoe, Adams, Pitkin, Boulder, Larimer, Broomfield and the Southern Ute tribe have all issued stay-at-home orders.³⁹ Soon after, Governor Polis issued a state-wide stay-at-home order.⁴⁰

Through all of this, the State has urged the public to follow what the healthcare community agrees are the best and in fact only, effective methods of slowing community spread: (1) social distancing, whereby individuals avoid all unnecessary gatherings and maintain a minimum of six feet from others and (2) quarantine of sick individuals and those who have had contact with them.⁴¹ The Governor has also urged that individuals most vulnerable to severe complications or mortality by the virus – older people and people

with underlying health conditions or those whose immune systems are compromised – stay home and away from others.⁴²

IV. Without immediate action, jails are likely to become an epicenter for broad community spread of COVID-19.

CDPHE has set a 10 person limit on social gatherings.⁴³ Yet, the vast majority of Colorado's jails house more than 50 prisoners and many hold hundreds and some more than a 1,000.⁴⁴ And these numbers that does not account for staff. As you well know, in these facilities, staff and inmates have close, daily contact. Generally, inmates sleep, eat and use the toilet within a few feet of one another. Under these circumstances, social distancing is physically impossible.⁴⁵ Many underfunded and overcrowded county jails are already unsanitary, with inmates having minimal and uncertain access to hygiene products and extremely limited access to medical care.⁴⁶ Further, in overcrowded jails, quarantining more than a small number of sick inmates is impossible. That is why public health experts agree that these conditions are ideal for spreading COVID-19,⁴⁷ perhaps more so than any other environment in Colorado.

Heightened vulnerability of inmates to serious illness or death from COVID-19.

Much like residents of elder-care homes, inmates who contract COVID-19 are significantly more vulnerable to severe complications and death than individuals living free in the community.⁴⁸ Looking at the Colorado prison population as a guide, we know that about 4,000 (or about one-fifth) of the 20,000 Colorado inmates are over 60 years old.⁴⁹ We also know that nearly 6,000 (or about 35 percent of) Colorado inmates have moderate to severe medical issues.⁵⁰ And we know that people incarcerated have higher rates of underlying health conditions including HIV, Hepatitis C, Tuberculosis, asthma and diabetes.⁵¹ There is every reason to believe that the 13,000 people locked in Colorado's jails every day are similarly vulnerable.⁵² Given this data, it is to be expected that COVID-19 will turn incarceration into a death sentence for some Colorado prisoners.⁵³ Indeed, in Kirkland, Washington, two-thirds of residents and 47 workers at a nursing home fell ill. 35 people died.⁵⁴ On the Diamond Princess cruise ship quarantined off the coast of Japan, more than 700 passengers and crew were diagnosed with COVID-19 and 6 people died.⁵⁵ It should be of serious concern that an outbreak at a jail could cause similar devastation, but on a much wider scale.

The health of prison and jail staff is directly tied to the health of inmates.

Thousands of correctional staff work in Colorado's county and city jails. There is no line, thin or otherwise, between the health of inmates and the health of correctional staff who work with those inmates. Given the inevitably close and sustained contact between jail staff and inmates, an epidemic in the jail will be an epidemic for prisoners, correctional staff, their families and the community at large.⁵⁶

Community spread from jails to free Coloradans. Inmates have persistent, daily, close contact with the public. Guards and other correctional staff are, of course, members of the public. Every day they interact closely with prisoners and then go home to interact closely with family and community members. Many other professionals enter jails routinely, including medical personnel, outside contractors (food, delivery, maintenance, etc.), competency evaluators and probation officers. Likewise, incarcerated individuals often have regular, sustained contact with the attorneys who represent them. Finally, and perhaps

most pertinently, Colorado inmates are released from confinement to the public in large numbers every day. An average of 586 people were released from county jails on a daily basis during the three month period ending December 31, 2019.⁵⁷ Indeed, for people held pretrial, which accounts for over 50% of the jail population, a short jail stay of 2-9 days is the norm before release.⁵⁸ Jails are a revolving door to and from community, creating the possibility of a super highway of transmission from the jail to free Coloradans.

Other downstream consequences of a jail or prison epidemic. If significant numbers of incarcerated people in jails sicken, it will burden health care systems and intensify the spread of the disease.⁵⁹ Jails are already short staffed and overcrowded. If correctional officers are sick and jails remain full, this will put the remaining correctional officers and inmates at risk. In Italy, riots occurred in at least two dozen prisons and six inmates died.⁶⁰ In Columbia, 23 inmates died and another 83 were injured in a jail riot over poor conditions inmates feared would result in the spread of COVID-19.⁶¹ Riots erupted in at least two overcrowded Lebanese prisons as inmates demanded to be released over fears the country's growing COVID-19 outbreak would spread rapidly among them.⁶² It will only become more difficult to take action as government workers become sick, are forced to work from home and respond to other challenges during the pandemic. In order to protect all Coloradans, now is the time to act. Unless you take immediate action to reduce your jail population to allow (1) inmates and guards to practice social distancing (which, at minimum requires getting down to single-occupied cells) and (2) to permit quarantine of a large group of infected prisoners, you can expect rapid spread of COVID-19 if and when it makes its way into your jail.⁶³

V. Constitutional obligations of sheriffs to high-risk inmates

Whenever the government detains or incarcerates someone, it has an affirmative duty to provide conditions of reasonable health and safety. As the Supreme Court has explained, “when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.” *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 199-200 (1989). As a result, the government must provide those in its custody with “food, clothing, shelter, medical care and reasonable safety.” *Id.* at 200. Similarly, under Colorado law, the sheriff of each county is specifically tasked with ensuring health and safety in the jails, because the sheriff is considered the “keeper of the county jail” and he is “responsible for the manner in which the [county jail] is kept” and must ensure that it is “safe.” C.R.S. § 17-26-102.

The sheriff is responsible under the Eighth Amendment to provide inmates with “basic human needs, one of which is ‘reasonable safety.’” *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (quoting *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989)).⁶⁴ 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. To establish liability under the Eighth Amendment framework, a plaintiff must demonstrate an objective component—that the deprivation is “sufficiently serious”—and a subjective component—that officials acted with “a sufficiently culpable state of mind” to show deliberate indifference in that the defendant “knew about and disregarded a ‘substantial risk’ to [the inmate’s] health or safety.” *Oxendine v. Kaplan*, 241 F.3d 1272, 1276 (10th Cir. 2001).

Courts in the Tenth Circuit have held that a plaintiff can state a sufficiently serious deprivation under the Eighth Amendment when a jail fails to implement protections that would prevent inmates from contracting communicable diseases. In *Loftin v. Dalessandri*, 3 F. App'x 658 (10th Cir. 2001), for example, the Tenth Circuit held that the plaintiff had an arguable Eighth Amendment claim when the jail refused to transfer him after he alleged that he ate, slept, showered and used a shared toilet with his cellmates who tested positive for TB. *Id.* at 660-61. In *Ferguson v. Bd. of Cty. Comm'rs*, No. CV 11-1001 WPL/CG, 2013 U.S. Dist. LEXIS 202824, at *20-21 (D.N.M. Apr. 2, 2013), the court held that “*Loftin* and *Helling* establish the right to be free from confinement in a cell with other inmates known to be carrying contagious, harmful diseases” and it denied qualified immunity to the jailer on this ground. *Id.* at *54-55 (relying on *Loftin* in holding that plaintiffs properly alleged claims for unconstitutional conditions of confinement when they stated they were held in a cell with high levels of MRSA). Courts from other jurisdictions have made similar findings.⁶⁵

In *Helling*, in a passage the included discussion of the risk of contracting a contagious disease, the Supreme Court explained that jailers violate the Eighth Amendment by maintaining conditions that pose an unreasonable risk of future harm, even if that harm has not yet come to pass. 509 U.S. at 33. The Supreme Court found: “It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.” *Id.* (citing *Ramos v. Lamm*, 639 F.2d 559, 572 (10th Cir. 1980)) (stating that a prisoner need not wait until he is actually assaulted before obtaining relief).

A prison official shows “deliberate indifference” when he knows that inmates face a substantial risk of harm and disregards that risk, ‘by failing to take reasonable measures to abate it.’” *Oxendine v. Kaplan*, 241 F.3d 1272, 1276 (10th Cir. 2001). The Tenth Circuit has considered current standards of care, and in particular public health guidelines, in determining whether defendants show deliberate indifference. *Mata v. Saiz*, 427 F.3d 745, 757-59 (10th Cir. 2005); *Loftin*, 3 F. App'x 658. In *Loftin*, the court relied on public health recommendations that those with suspected or confirmed TB disease be placed in isolation until the patient is determined to be noninfectious and that prison officials promptly investigate cellmates to control the spread. 3 F. App'x at 660. Similarly, in *Ferguson*, the court relied on CDC information that “MRSA is contagious, spread by having contact with individuals or objects touched by infected individuals, and is ‘most likely to be spread where people are in close contact with others.’” 2013 U.S. Dist. LEXIS 202824, at *54 (citing *MRSA Infections: Causes of MRSA Infections*, CENTERS FOR DISEASE CONTROL AND PREVENTION (August 9, 2010), <http://www.cdc.gov/mrsa/causes/index.html>). The Tenth Circuit has explained that “[w]hile published requirements for health care do not create constitutional rights, such protocols certainly provide circumstantial evidence that a prison health care [worker] knew of a substantial risk of serious harm.” *Mata*, 427 F. 3d at 757-58.

As earlier sections in this letter make clear, public health guidelines regarding COVID-19 are clear. The only way to minimize spread of the virus is to allow inmates and correctional staff to practice social distancing and regular handwashing.⁶⁶ Failure to follow this clear standard of preventive care will very likely result in the broad spread of the virus in Colorado jails. For high-risk inmates, contraction of this virus has a substantially heightened probability of serious illness or death. High-risk inmates housed and left to

intermingle with others without social distancing are unduly subject to a life-threatening condition in violation of the Eighth Amendment's guarantee of "reasonable safety" in a carceral setting.

Thus, to comply with Eighth Amendment standards, jails must reduce their population to allow social distancing, thereby providing a reasonable amount of protection to inmates and staff. At minimum, this generally means bringing down the jail population so that inmates sleep in a single cell. We believe a court is likely to view failure to take all necessary steps to reduce the population in your jail as deliberate and conscious disregard of a substantial risk to high-risk inmates' health and safety, in violation of the Eighth Amendment.

While we understand that this crisis calls for actions by many figures in the criminal justice system to assist in rapid decarceration, it is ultimately the jailer who is constitutionally responsible for maintaining safe conditions in a jail. "[J]ailers hold not only the keys to the jail cell, but also the knowledge of who sits in the jail and for how long they have sat there. They are the ones directly depriving detainees of liberty." *Armstrong v. Squadrito*, 152 F.3d 564, 579 (7th Cir. 1998). "In the final analysis, the sheriff is the custodian of the persons incarcerated in the jail, and as such, it is he who is answerable for the legality of their custody." *Luck v. Rovenstine*, 168 F.3d 323, 326 (7th Cir. 1999); *see also Lingenfelter v. Bd. Of County Commissioners*, 359 F. Supp. 2d 1163 (D. Kan. 2005) ("Although it is true that the custodian of an arrestee does not have authority to *force* a judge to make a determination of probable cause, the custodian does have the power to release an arrestee if no timely probable cause finding has been made."). Further, in Colorado, statutes authorize a jailer or sheriff can remove a prisoner from custody "in case of sudden fire, infection, or other necessity." C.R.S. 13-45-111.⁶⁷

VI. Conclusion & Additional Recommendations.

Based on the foregoing, we hope you will agree that, to fulfill your constitutional obligation to inmates and your societal obligation to public health, that you must take all possible steps to substantially reduce the jail population, so that all people remaining inside the jail have the ability to practice social distancing. We are available to discuss this matter with you at any time and are open to partnering to come up with creative solutions to meet this crisis. In that vein, we offer the following additional recommendations that accord with those of public health experts.

- 1. Provide free access to adequate medical care in prisons and jails.** All medical co-pays should be waived during the epidemic. By charging high medical co-pays, jails discourage inmates from accessing immediate medical care that can prevent the spread of the virus. The CDC warns that incarcerated persons may hesitate to report symptoms of COVID-19 or seek medical care due to co-pay requirements and fear of isolation.⁶⁸ Medical care must include preventive care, medical testing and prompt treatment — including any necessary transfers to higher care for any illness. The La Plata County Jail is waiving co-pays for medical services in the case of an outbreak.⁶⁹ To encourage inmates to seek treatment, medical care should be provided without co-pays or additional costs.

- 2. Provide as many opportunities for prisoner contact with community as possible.** Sheriffs must implement procedures to allow programming to continue; in jurisdictions where local health officials have urged limiting volunteer access to jails and prisons, this may mean allowing staff or incarcerated people to run programs. Decisions to suspend all visitation to jails should be made in consultation with local public health officials and only when absolutely necessary. Any decision to suspend visitation should be accompanied by clear plans and procedures to substitute other forms of communication such as increased access to phone calls and video calls.

Fees for phone and video calls should be waived. Without visitation, jails and prisons should ensure free access to other available means of communication with the outside world including, but not limited to, emails, voice calls and video calls. For example, the South Correctional Entity in Seattle, which houses nearly 600 inmates, has petitioned the provider to offer free video-conferencing to families during the pandemic.⁷⁰ Sheriffs should do the same.

Legal communications must continue unimpeded and free of charge. People who are incarcerated must have ready access to their attorneys throughout the epidemic. If necessary, facilities can implement non-contact legal visits, or can increase the availability of confidential phone or video calls to reduce the number of in-person visits. Any attorney-client calls must be free of charge.

- 3. Education of correctional staff and inmates.** Incarcerated people need to be informed about the virus and the measures they can take to minimize their risk of contracting or spreading it. They must be educated on the importance of proper handwashing, coughing into their elbows, not touching their face and social distancing to the extent they can. Likewise, correctional staff must be educated about the virus to protect themselves and their families, as well as the people in their custody. Sheriffs should discourage “presenteeism”, where staff come to work despite being ill. Explain the risk to staff and encourage them to stay home if they are ill.
- 4. Sanitation.** Sheriffs must ensure that facilities are as empty, safe and clean as possible. They must develop and announce a plan to disinfect and regularly sanitize the facility, particularly any common areas. The most basic aspect of infection control is hygiene. Make adherence to good hygiene easy for staff and inmates. Sheriffs must coordinate with local public health experts to ensure that all facilities have adequate supplies of soap, hand sanitizer, tissues and other hygiene or cleaning products. Each of these products must be made freely and constantly available to all staff and incarcerated people – even if, for the latter, prohibitions on alcohol need to be modified to allow distribution of hand sanitizer.
- 5. Non-punitive isolation.** Sheriffs must implement non-punitive procedures for housing people who are exposed to the virus, who are at high risk of serious illness, or who screen or test positive for COVID-19. This should not result in prolonged, wide-spread lock downs. When inmates are placed in isolation for public health reasons, sheriffs should ensure it does not feel punitive. For example, inmates in isolation should have access to basic comforts and activity-related materials. Sheriffs should encourage inmates to notify medical staff as early as possible if they

experience symptoms of infection. Fear of being placed in an overly-restrictive cell may delay their notification, which is counterproductive.

6. **Make public all plans for managing COVID-19 in jails and prisons.** Sheriffs must implement procedures to care for those who become ill in their facilities. Those procedures must include, at a minimum: screening of staff; screening and testing of inmates for COVID-19; increased access to medical care and removal of all co-pays; access to the medication and equipment necessary to treat those who contract the virus; and, the ability to immediately transfer sick patients to outside facilities for care when necessary. Transparency — which engenders public trust and collaboration — has proven critical to combatting COVID-19 around the world. Given the high stakes, each sheriff's office must make transparent its plans to address COVID-19 in jails and prisons.

7. **Data collection.** As with any contagious disease, data collection is critical to understanding and fighting the virus. Jails must be part of this process. The same information that is tracked in the community must be tracked in jails.

Sincerely,



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Mark Silverstein
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Attach. 1 – Letter from Dr. Franco-Paredes

¹ Lance Benzel, *Colorado Springs public defender tests positive for COVID-19*, THE GAZETTE (Mar. 23 2020), https://gazette.com/news/colorado-springs-public-defender-tests-positive-for-covid/article_c2596882-6d31-11ea-88b2-07632c876727.html; Elise Schmelzer, *Colorado public defenders, advocates call for drastic change to prevent coronavirus in jails, prisons*, THE DENVER POST (Mar. 17 2020), <https://www.denverpost.com/2020/03/17/colorado-public-defenders-criminal-justice-coronavirus/>; Susie Ziegler, *El Paso County sheriff's deputy tests positive for COVID-19*, KRDO (Mar. 22 2020), <https://krdo.com/news/top-stories/2020/03/22/el-paso-county-sheriffs-deputy-tests-positive-for-covid-19/>; Carina Julig, *Larimer County inmate in community corrections program test positive for coronavirus*, THE DENVER POST (Mar. 22 2020), <https://www.denverpost.com/2020/03/22/coronavirus-larimer-county-inmate/>

² Elise Schmelzer, *22 inmates at Denver's two jails under observation after showing coronavirus symptoms, none have been tested*, THE DENVER POST (Mar. 20 2020), <https://www.denverpost.com/2020/03/20/denver-jail-coronavirus-observation/>

³ Renie Dugwyler, *Difficult Decisions during Different Times*, JEFFERSON COUNTY SHERIFF'S OFFICE (Mar. 23, 2020), <https://www.iefcco.us/Blog.aspx?IID=92>

⁴ See *Attach. 1*, Carlos Franco-Paredes, MD, MPH, University of Colorado Anschutz Medical Campus (Mar. 22, 2020).

⁵ Available at <https://drive.google.com/file/d/1q7wkqi-NeU5nmUfCBQwn-6CrvTKdYJ5P/view>.

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⁶⁴ These principles also apply to pretrial detainees under the Fifth Amendment, which provides protections even greater than the Eighth Amendment. The Eighth Amendment, which applies to persons convicted of criminal offenses, allows punishment as long as it is not cruel and unusual. But the Fifth Amendment’s due process protections do not allow punishment at all. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979) (“Due process requires that a pretrial detainee not be punished.”)

⁶⁵ Several courts express that “inmates may be entitled to relief under the Eighth Amendment where they proved threats to personal safety from the mingling of inmates with serious contagious diseases” and “that inmates can state an Eighth Amendment claim for confinement in a cell with an inmate who has a serious contagious disease that is spread by airborne particles, such as tuberculosis.” *Joy v. Healthcare C.M.S.*, 534 F. Supp. 2d 482, 485 (D. Del. 2008) (citing *Bolton v. Goord*, 992 F. Supp. 604, 628 (S.D.N.Y. 1998) (acknowledging that prisoner could state Eighth Amendment claim for confinement in same cell as inmate with serious contagious disease, such as tuberculosis, but rejecting claim in this case because prisoner had not shown that inmates with active infectious tuberculosis were double-celled). In *Joy*, the court held that a plaintiff adequately

pleaded inadequate conditions in a jail because he alleged that the warden “was aware that inmates were not thoroughly screened for disease before going into general population and that Correctional Medical Services does not have a policy in place to examine inmates before placing them into general population.” 534 F. Supp. 2d at 485.

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⁶⁷ Courts have repeatedly recognized that release of detained persons may be necessary when jailers are unable to maintain constitutionally adequate conditions due to the number of people in the correctional facility. *Brown v. Plata*, 563 U.S. 493, 511 (2011) (“When necessary to ensure compliance with a constitutional mandate, courts may enter orders placing limits on a prison’s population.”); *Duran v. Elrod*, 713 F.2d 292, 297- 98 (7th Cir. 1983), cert. denied, 465 U.S. 1108 (1984) (concluding that court did not exceed its authority in directing release of low-bond pretrial detainees as necessary to reach a population cap); *Mobile Cty. Jail Inmates v. Purvis*, 581 F. Supp. 222, 224-25 (S.D. Ala. 1984) (concluding that district court properly exercised remedial powers to order a prison’s population reduced to alleviate unconstitutional conditions, and noting other cases); *Inmates of the Allegheny Cty. Jail v. Wecht*, 565 F. Supp. 1278, 1297 (W.D. Pa. 1983) (order to reduce overcrowding “is within our power to correct the constitutional violations”); *Breneman v. Madigan*, 343 F. Supp. 128, 139 (N.D. Cal. 1972) (“If the state cannot obtain the resources to detain persons . . . in accordance with minimum constitutional standards, then the state simply will not be permitted to detain such persons.”).

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