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RECOMMENDED COVID-19 EXECUTIVE RESPONSE

We write in relation to the impending crisis within Michigan’s jails caused by the COVID-19 pandemic. As we believe this impending crisis would be better and more efficiently resolved by a single state-wide directive instead of a patchwork of county-by-county approaches, we ask that the Director of the Department of Health and Human Services (MDHHS) exercise his statutory powers to determine that a public health crisis exists and direct the release of certain detainees within Michigan’s county jails.

1. The COVID-19 Pandemic

As we are all aware, the COVID-19 pandemic has reached crisis proportions in our state and country. In response to the crisis, Governor Whitmer has declared a State of Emergency, has closed schools, and has barred gatherings of more than 50 people. MI Executive Order 2020-11 (March 17, 2020). The Michigan courts have taken this a step further, and directed that when cases must be heard in court over the coming weeks and possibly months, courtroom access be limited to no more than 10 people at a time. Administrative Order 2020-2 (March 18, 2020).

These directives are based on the recognition that “social distancing” can potentially slow the spread of COVID-19. According to the Centers for Disease Control and Prevention (CDC), social distancing “means remaining out of congregate settings, avoiding mass gatherings, and maintaining distance (approximately 6 feet or 2 meters) from others when possible.” See www.CDC.gov. But social distancing is impossible to accomplish in a jail setting, which was not designed or built to provide individual detainees this amount of individual space. Without the ability to practice social distancing and to isolate detainees, the COVID-19 virus is certain to come to Michigan’s jails. In time, as sick detainees then serve their full sentences and are released, this will affect the larger population and will counteract the extraordinary efforts being made across the state to limit the spread of this deadly disease.

2. Michigan's Jail Population

According to a January 2020 report issued by the MI Joint Task Force on Jail and Pretrial Incarceration, in 2016, there were an average of 16,600 detainees incarcerated in Michigan's jails. [Report of MI Joint Task Force on Jail and Pretrial Incarceration](#), p 7. About half are pre-trial detainees, and half have been convicted of crimes. *Id.*

3. Michigan's Emergency Jail Overcrowding Act

Michigan's Emergency Jail Overcrowding Act reflects a recognition by the people of our State that the release of jail prisoners is warranted when they are being housed in unsafe conditions. See MCL 801.51 *et seq.* Unfortunately, the Act itself is not designed to address this unprecedented crisis. The Act permits release of jail detainees, but only after the county sheriff certifies that the jail population exceeds certain set thresholds for the county jail, MCL 801.52, and after the sheriff's certification is upheld by a majority of county judges and officials. MCL 801.53. The statute requires a number of deliberate steps to reduce a jail's population, each of which requires time. *Kent County Prosecutor v Kent County Sheriff*, 428 Mich 314 (1987) (describing process). Simply put, this Act was designed to address a different problem than that presented by the COVID-19 crisis, as has limited utility in the immediate situation.

But the Act does provide guidance for how to prioritize the release of large groups of detainees. That is, the Act identifies specific detainees who should be immediately released when a finding of overcrowding is made, recommends how sheriffs and judges can maintain the jail population below impermissible overcrowding limits, and provides steps for identifying and releasing additional detainees if overcrowding continues. See MCL 801.51a; MCL 801.55-.58. As set forth below, these provisions may be helpful to the Director, should he exercise his authority under the Public Health Code.

4. The Public Health Code Authorizes the MDHHS Director to Act

Under the Public Health Code, the Director of the Michigan Department of Health and Human Services has broad powers to address this impending crisis by directing the release of certain detainees who are currently incarcerated in Michigan's county jails. Under MCL 333.2251(3):

If the director determines that conditions anywhere in this state constitute a menace to the public health, the director may take full charge of the administration of applicable state and local health laws, rules, regulations, and ordinances in addressing that menace.

There is ample evidence that COVID-19 constitutes a "menace to the public health." In recognition of this, procedures and controls have been put in place for the larger population, but now it is time to focus attention to placing the same procedures

and controls upon our jail population. Doing so will not only keep the jails safer, but it will also help to do the same for the larger population.

5. Specific Recommendations

We recommend that if the Director exercises his authority under MCL 333.2251(3) to order the release of certain jail detainees, that he also direct that such releases be consistent with the Emergency Jail Overcrowding Act, current CDC guidelines, and the recommendations within the Report of MI Joint Task Force on Jail and Pretrial Incarceration.

That is, we recommend that in the exercise of his authority, the Director order the immediate release of the following already sentenced and pre-trial detainees:

- (1) Any sentenced detainee who has served 85% or more of his or her sentence, unless he or she is serving a sentence for a violent or assaultive offense, sex offense, prison or jail escape offense, weapons offense, drunk driving offense, or a controlled substance offense except possession of less than 25 grams of a controlled substance. [MCL 801.51a(1)(b)(i).]
- (2) Any detainee detained in the county jail for a civil contempt adjudication for failure to pay child support who has no other charges pending against him or her. [MCL 801.51a(1)(b)(ii).]
- (3) Any detainee over age 60. [See www.CDC.gov.]
- (4) Any detainee who has a serious underlying condition, such as heart or lung disease, or diabetes. [See www.CDC.gov.]
- (5) Any detainee who is incarcerated for a traffic violation. [Report of MI Joint Task Force on Jail and Pretrial Incarceration, p 19 (Recommendation #1).]
- (6) Any detainee who is incarcerated for failure to appear or failure to pay. [Report of MI Joint Task Force on Jail and Pretrial Incarceration, p 21 (Recommendation #4)].
- (7) Any detainee with behavioral health problems and who can be diverted for treatment. [Report of MI Joint Task Force on Jail and Pretrial Incarceration, p 21-22 (Recommendation #5)].
- (8) Any pre-trial detainee unless the court makes an individualized determination that the person poses a significant articulable risk of nonappearance, absconding, or causing bodily harm to another reasonably identifiable person or themselves. [Report of MI Joint Task Force on Jail and Pretrial Incarceration, p 25 (Recommendation #9a)].

- (9) Any detainee convicted of a misdemeanor (except those defined as serious misdemeanors in MCL 780.811 or nonserious misdemeanors with a recent assaultive felony conviction). [Report of MI Joint Task Force on Jail and Pretrial Incarceration, p 27-28 (Recommendation #13a)]
- (10) Any detainee sentenced under an “intermediate sanction” sentencing guideline. [Report of MI Joint Task Force on Jail and Pretrial Incarceration, p 28 (Recommendation #14a)]
- (11) Any detainee incarcerated for a probation revocation involving non-violating behavior or a “technical violation.” [Report of MI Joint Task Force on Jail and Pretrial Incarceration, p 29-30 (Recommendation #15); see also *id.*, p 30, n 52 (defining technical violation).].

We also recommend that in the exercise of his authority, the Director order that:

- (12) Within 7 days of the Director’s order, the sheriff of each county jail present to the chief judge of the county a list of remaining jail detainees and associated case-related information, so that these detainees and their cases may receive individualized review and possible release. MCL 801.55-56.
- (13) The sheriff of each county jail equally reduce the original jail sentences, not including good time, of every remaining detainee, by a percentage not to exceed 30%. MCL 801.57.
- (14) The sheriff and judges of every county immediately adopt practices consistent with those set forth in MCL 801.55 and the recommendations in the Report of MI Joint Task Force on Jail and Pretrial Incarceration, to reduce the addition of new detainees into the jails.

Thank you for your consideration of these measures. At SADO, we are ready to assist with any issues or input as the crisis continues to develop. Please feel free to reach out and consider us a resource. It has been inspiring to see the State of Michigan come together during this emergency.

March 19, 2020