

March 18, 2020

To:

Governor John Bel Edwards  
Chief Justice Bernette Joshua Johnson  
Justice William J. Crain  
Justice Scott J. Crichton  
Justice James T. Genovese  
Justice Marcus R. Clark  
Justice Jefferson D. Hughes III  
Justice John L. Weimer



PO Box 56157  
New Orleans, LA 70156  
504-522-0617  
laaclu.org

Alanah Odoms Hebert  
*Executive Director*

Dear Governor Edwards and Members of the Louisiana Supreme Court,

As you are aware, in response to the very serious threat posed by coronavirus, Governor Edwards' executive order has enacted a host of sweeping restrictions designed to limit the spread of the virus and protect the public. To be sure, we are sensitive to the severity of the evolving crisis and know that our elected leaders are working diligently to respond to the urgency of the matter.

While we understand the need for strong measures to protect public health, we have grave concerns that measures to slow down the legal process will wrongly trap presumably innocent people behind bars – while unintentionally hampering efforts to limit the spread of the disease.

We are writing to urge you to ensure there are strong safeguards to protect the fundamental constitutional rights of people held in jail during this crisis, and to ensure Louisiana's judicial districts have the technological capacity to uphold those rights.

In the wake of Hurricane Katrina, Louisiana's suspension of legal deadlines in criminal cases resulted in widespread unconstitutional confinement as people were literally lost in the system. Now, as close person-to-person contact is fueling the spread of COVID-19, we cannot afford to repeat the mistakes of the past and hold thousands of people in jail for unnecessarily long periods of time. Protecting the public during this serious health crisis is consistent with protecting the individual civil rights of people who are involved with the criminal legal system. Through your swift action, we hope for a coordinated approach among courts, district attorneys, and sheriffs to ensure public safety and avoid repeating mistakes of 2005.

Executive proclamation JBE 2020-30 and HCR 23 provide for the suspension of legal deadlines within which to institute criminal charges in light of COVID-19. This presents a most grave threat to fundamental civil liberties. History tells us that without additional safeguards in place, this suspension of law will likely cause people who are arrested and

held in jail to be lost in the system for weeks or months as the crisis unfolds, without criminal charges and without counsel to represent them.

The statute most at issue is Article 701 of the Code of Criminal Procedure, which sets deadlines for district attorneys to file charges while people are held in jail. In 2005 Governor Blanco also suspended the Code of Criminal Procedure, including Article 701. That suspension resulted in the unlawful detention of thousands of individuals. People were held without any criminal charges whatsoever for months, and in some cases even longer than a year. Because people had not been charged with crimes, they had not been appointed a lawyer. And without a lawyer, no one was helping to secure release. Multiple civil lawsuits were filed against the state and municipalities, resulting in damages awards. It took volunteer lawyers almost two years to secure the release of those individuals from unlawful custody.

We cannot risk repeating this history. Governor Edwards and Chief Justice Johnson have been champions for due process and criminal legal reform. Moreover, the Supreme Court faithfully discharged its duty to ensure compliance with due process and other substantive criminal legal reforms by way of trainings for judges after the passage of the Justice Reinvestment Act in 2017. At a time when we are trying to right-size our jail population and minimize the spread of COVID-19 in our jails, it is imperative that adequate safeguards are in place to prevent the unnecessary incarceration of thousands of Louisianans.

### **Requests of Governor Edwards**

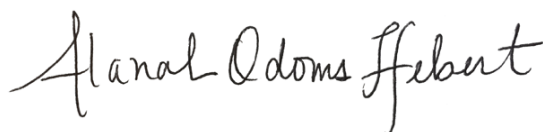
- Instruct district attorneys and courts to honor the deadlines for charging and arraigning arrestees provided by Article 701 of the Code of Criminal Procedure. Depending on the alleged offense, Article 701 permits district attorneys 45, 60, or 120 days to decide whether to charge a person with a crime if the person is held in jail. This is sufficient time to decide whether to charge most cases, especially low-level misdemeanors. Further, the decision whether to institute charges is one that prosecutors can make without being “in the field,” by communicating with law enforcement by phone, reviewing documents, and making charging decisions remotely. Prosecutors in some jurisdictions already screen arrest decisions by phone under ordinary circumstances. District attorneys have an array of tools available to properly investigate and decide whether to charge under the statutory timelines. At this time of emergency, it is critical that they use them.
- To ensure that people booked into jail are not lost in the system for the duration of this crisis, insist that courts, district attorneys, and sheriffs maintain exhaustive daily records of every person arrested and booked into jail, the date of arrest and charge, and any lawyer assigned to represent that individual.
- In the event that the COVID-19 crisis has not abated upon the expiration of the current proclamation on April 13 and a new proclamation is necessary, issue an amended proclamation that includes clear exemptions to ensure the safeguard of constitutional rights, including specifically requiring timely bail determinations and upholding laws requiring charging decisions and arraignment.
- Work with district attorneys, criminal defense lawyers, and law enforcement to identify strategies to reduce pretrial jail populations and criminal caseloads.

### **Requests of the Louisiana Supreme Court**

- Instruct judicial district courts to conduct daily bail hearings.
- In the interest of slowing the spread of COVID-19 in parish jails, recommend that judges making bail determinations institute a presumption of release on recognizance and, when statute prohibits release on recognizance, fix only nominal bail. Money bail should only be imposed upon people who pose a clear danger to the community, to ensure we are not detaining people simply because they do not have a certain amount of money.
- Commit resources to ensure judicial districts have the financial and technological capacity to uphold arrestees' fundamental constitutional rights, including providing technical equipment to conduct bail hearings and arraignment remotely.
- Direct the Office of the Judicial Administrator to disseminate guidance related to protecting arrestees' and defendants' civil liberties to each judicial district court.

As the State of Louisiana takes drastic and necessary measures to protect against the threat of COVID-19, we urge the executive and judicial branches to speak with one voice to protect one of our most fundamental civil liberties—the right not to be detained in jail without criminal charge.

Respectfully,



Alanah Odoms Hebert  
Executive Director  
ACLU of Louisiana

Lindsey Blouin  
President, Louisiana Association of Criminal Defense Lawyers

Meghan Garvey  
Legislative Chair, Louisiana Association of Criminal Defense Lawyers

Katherine M. Mattes  
Director, Criminal Justice Clinic and Senior Professor of the Practice  
Tulane Law School

Pamela R. Metzger  
Director, Deason Criminal Justice Reform Center and Professor of Law  
Southern Methodist University Dedman School of Law

cc:

Hon. Page Cortez, Senate President

Hon. Clay Shexnayder, Speaker of the House of Representatives

Hon. Ted James, Chairman, House Committee on Administration of Criminal Justice