

STATE OF WISCONSIN SUPREME COURT

WISCONSIN ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS;
DISABILITY RIGHTS WISCONSIN,
INC.; CRAIG SUSSEK; and RAYMOND
D. NINNEMAN,
Petitioners,

No. _____

TONY EVERS, Governor of the State of
Wisconsin, KEVIN A. CARR, Secretary of
the Wisconsin Department Of Corrections,
and JOHN TATE II, Chairman Of the
Wisconsin Parole Commission,
Respondents.

**EMERGENCY PETITION AND MEMORANDUM TO
SUPREME COURT TO TAKE JURISDICTION
OF AN ORIGINAL ACTION**

Ellen Henak, SBN 1012490

Henak Law Office, S.C.
316 N. Milwaukee St., #535
Milwaukee, WI 53202
414-283-9300

R. Timothy Muth, SBN 1010710
Laurence J. Dupuis, SBN 1029261
Emma Shakeshaft, SBN 10920046
Asma Kadri Keeler, SBN 1114761

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207 E. Buffalo St., #325
Milwaukee WI 53202
(414) 272-4032

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**THIS COURT SHOULD EXERCISE ORIGINAL JURISDICTION
IN THE FACE OF AN OVERWHELMING HEALTH EMERGENCY**

1. Petitioners, by their attorneys, urgently petition the Wisconsin Supreme Court, pursuant to Wisconsin Statutes §§809.70 and 809.71, Article VI, Section 3(2) of the Wisconsin Constitution, and 42 U.S.C. § 1983, to take jurisdiction of an original action against Tony Evers, in his official capacity as Governor of the State of Wisconsin, Kevin A. Carr, Secretary of the Wisconsin Department of Corrections, and John Tate II, Chairman of the Wisconsin Parole Commission.

2. This emergency petition seeks extraordinary relief for extraordinary circumstances. To mitigate the imminent threat of mortal harm that the COVID-19 pandemic will inflict upon incarcerated people, on corrections staff, and on all of our communities, this petition asks the Court to exercise its supervisory writ powers, as well as its jurisdiction to enforce federal and state constitutional prohibitions on cruel and unusual punishments by means of injunctive relief and a writ of mandamus.

3. Protection is desperately needed for the roughly 23,000 vulnerable people incarcerated in overcrowded Wisconsin prisons and the thousands more in county jails where no social distancing is possible. Over the past two weeks, the first confirmed COVID-19 cases have appeared in the State's overcrowded prisons - eleven department of corrections staff and four prisoners have been

diagnosed with the disease.¹ At least nine inmates and five staff have the disease at Wisconsin county jails. This is a warning sign that immediate, drastic action is needed. Correctional facilities, where physical distancing and vigilant hygiene are impossible under current conditions, can dramatically accelerate the rapid spread of infectious disease.² Outbreaks in Wisconsin prisons will, of course, imperil the lives of incarcerated people, but outbreaks will also endanger correctional officers and medical staff, their families, and the communities to which staff return. An outbreak of COVID-19 will rapidly overwhelm meager DOC medical facilities and then overwhelm hospital resources in communities where they are located.

4. Tragically, the actions to date by the Respondent State officials have not fulfilled their plain duty to take the only course recommended by public health experts: a significant and immediate reduction of prison and jail populations so that social distancing can occur. Respondents have removed only 304 inmates from the prisons out of a population of close to 23,000 since the statewide public health emergency was declared. The prisons remain overflowing at a level 30% more than their design capacity. This Court can and must

¹ <https://doc.wi.gov/Pages/COVID19%28Coronavirus%29/COVID19.aspx>

² *A Public Health Doctor And Head Of Corrections Agree: We Must Immediately Release People From Jails And Prisons*, The Appeal, Mar. 27, 2020 (<https://theappeal.org/a-public-health-doctor-and-head-of-corrections-agree-we-must-immediately-release-people-from-jails-and-prisons/>)

intervene to guarantee protection of the lives and constitutional rights of persons in the prisons and jails of the State of Wisconsin.

5. This Court possesses the power to entertain an original action which responds to urgent, statewide crises like this one. This Court has noted “The supreme court hears original actions in cases that involve substantial legal questions of more than ordinary importance to the people of the state,” *Panzer v. Doyle*, 2004 WI 52, ¶ 2, 271 Wis. 2d 295, 680 N.W.2d 666, and that normally these questions “require prompt and authoritative determination.” *Id.* Nothing could require more prompt and authoritative determination than the State’s response to COVID-19 for incarcerated persons.

6. “The supreme court limits its exercise of original jurisdiction to exceptional cases in which a judgment by the court significantly affects the community at large.” *Professional Police Ass'n v. Lightbourn*, 2001 WI 59, ¶ 4, 243 Wis. 2d 512, 627 N.W.2d 807.

7. This Court described its broad powers of original jurisdiction in *In re Kading*, 70 Wis. 2d 508, 235 N.W.2d 409 (1975), *rehearing den.* 70 Wis. 2d 508, 238 N.W.2d 63 (1976):

The inherent power of this court is shaped, not by prior usage, but by the continuing necessity that this court carry out its function as a supreme court.

8. This action calls for the Court to exercise its broad powers to issue a writ of mandamus. Three of the elements for such a writ are “an appeal is an

inadequate remedy;” “grave hardship or irreparable harm will result;” and the party requested relief “promptly and speedily.” *State ex rel. CityDeck Landing LLC v. Circuit Court for Brown Co.*, 2019 WI 15, ¶ 15, 385 Wis.2d 516, 922 N.W.2d 832 (internal quotations omitted). Petitioners have acted promptly with the sudden onset of this pandemic; the death and illness threatened by COVID-19 constitutes grave, irreparable hardship; and resorting to actions in the lower courts when there is a state-wide crisis growing larger with each passing hour is simply inadequate. The fourth element, failure to comply with a plain duty, is discussed throughout the remainder of this memorandum.

9. Independently, state courts in Wisconsin have the authority to enforce the Eighth Amendment’s and Wisconsin Constitution Art. I, § 6’s prohibition on cruel and unusual punishment. This Court has long recognized state court jurisdiction over actions under 42 U.S.C. § 1983 to enforce federal rights. *Terry v. Kolski*, 78 Wis. 2d 475, 479, 254 N.W.2d 704 (1977) (state courts have jurisdiction to enforce federal constitutional rights pursuant to 42 U.S.C. § 1983); *Casteel v. Vaade*, 167 Wis. 2d 1, 13, 481 N.W.2d 277 (1992); *Shaw v. Leatherberry*, 2005 WI 163, ¶ 21, 286 Wis. 2d 380, 391, 706 N.W.2d 299. Further, the courts have the power to enforce the Eighth Amendment by removing prisoners from crowded conditions that expose them to extreme health risks. As the U.S. Supreme Court said in analogous circumstances, orders to remove prisoners are appropriate when overcrowding creates health risks that “fall[]

below the standard of decency that inheres in the Eighth Amendment,” because the “constitutional violation requires a remedy, and a remedy will not be achieved without a reduction in overcrowding.” *Brown v. Plata*, 563 U.S. 493, 545 (2011).

10. For the same reasons that an original action for a writ of mandamus is proper here in the context of this emergency, a section 1983 claim, which involves the governor and the heads of the correctional and parole systems, and seeks emergency relief in a crisis affecting all incarcerated persons in the State, requires a rapid statewide decision.

ISSUE PRESENTED

During a time of extraordinary public health emergency should this Court issue an injunction and a writ of mandamus to enforce the clear legal right of incarcerated people under the state and federal constitutions to be free from cruel and unusual punishment, where State officials have failed in their plain duty to protect the lives of incarcerated persons and criminal defendants in the Wisconsin criminal justice and corrections system and the broader population of the State?

PARTIES

11. Petitioner Wisconsin Association of Criminal Defense Lawyers (“WACDL”) is a membership association of more than 400 attorneys who provide criminal defense representation to defendants in the State of Wisconsin and whose mission includes promoting the proper administration of criminal

justice. Attorneys who are members of WACDL provide legal representation for many persons who are or may be incarcerated in correctional facilities in the State of Wisconsin. Its offices are located in Monona, Wisconsin.

12. Petitioner Disability Rights Wisconsin, Inc. (“DRW”) is a non-profit corporation created under federal and Wisconsin law in order to “[p]ursue legal, administrative and other appropriate remedies to ensure the protection of the rights of persons with developmental disabilities or mental illness.” Wis. Stat. § 51.62(3)(a)(1), including remedies when such persons are incarcerated in the State of Wisconsin. Its offices are located at 131 W. Wilson St., Suite 700, Madison, Wisconsin.

13. Petitioner Craig Sussek is an inmate at John C. Burke Correctional Center in Waupun, Wisconsin. In 1996, Mr. Sussek was sentenced to 80 years in prison for a crime he committed at age 16, with eligibility to seek parole in 2015. Mr. Sussek has been diagnosed with kidney disease, which makes him particularly susceptible to serious injury or death if he contracts COVID-19.

14. Petitioner Raymond Ninneman is currently incarcerated in the Winnebago Correctional Center in Winnebago, Wisconsin. Mr. Ninneman is 66 years old and currently has one year remaining on a two-year sentence. Mr. Ninneman has been diagnosed with cardiac disease leaving him with only 25-30% of heart function. This disease makes Mr. Ninneman particularly susceptible to serious injury or death if Mr. Ninneman contracts COVID-19.

15. Respondent Tony Evers is Governor of the State of Wisconsin, and has authority to grant various forms of clemency to people convicted of crimes pursuant to Wis. Const., art. V, § 6. This authority includes the ability to grant reprieves from sentences on incarcerated persons, staying the completion of their sentences until some later date. Despite requests that the Governor act promptly to reduce prison populations, he has not used his power despite a plain duty to do so in the current public health emergency. His office address is 115 East State Capitol, Madison.

16. Respondent Kevin A. Carr, is the Secretary of the Wisconsin Department of Corrections, and in carries out the DOC's obligation to "[a]dminister parole, extended supervision, and probation matters, except that the decision to grant or deny parole to inmates shall be made by the parole commission." Wis. Stat. § 301.03(3). Secretary Carr is also given the power by statute to remove prisoners in the event of an emergency: "When an emergency exists which in the opinion of the secretary makes it advisable, the secretary may permit the temporary removal of a convicted person for such period and upon such conditions as the secretary determines." Wis. Stat. § 304.115. He has not used his statutory power to remove persons despite a plain duty to do so in the current public health emergency. Respondent Carr's office address is 3099 East Washington Ave., Madison.

17. Respondent John Tate II, is the Chairperson and Commissioner of the Wisconsin Parole Commission. As Chairperson, Respondent Tate is responsible for the administrative functions and supervision of “the [parole] commission and its activities and shall be the final parole-granting authority” Wis. Stat. § 304.01(1). He has not used that power despite a plain duty to do so in the current public health emergency. Respondent Tate’s office address is 3099 E Washington Ave, Madison,

STATEMENT OF FACTS

A. The Deadly Coronavirus Pandemic.

18. The novel coronavirus that causes COVID-19 has led to a global pandemic.³ As of April 8, 2020, there were more than 400,000 reported COVID-19 cases and 12,900 deaths in the United States.⁴ Projections indicate that as many as 240,000 people in the U.S. could die from COVID-19, accounting for existing interventions.⁵

19. The coronavirus pandemic has led to states of emergency in Wisconsin and the nation. Governor Evers first declared a public health

³ Betsy McKay et al., *Coronavirus Declared Pandemic by World Health Organization*, WALL ST. J. (Mar. 11, 2020, 11:59 PM), <https://cutt.ly/UtEuSLC>.

⁴ Coronavirus COVID-19 Global Cases by the Center for Systems Science and Engineering at Johns Hopkins University, April 4, 2020 at 9:04 pm, <https://bit.ly/2V8FgsG>

⁵ R. Noack, et al., *White House Task Force Projects 100,000 to 240,000 Deaths in U.S., Even With Mitigation Efforts*, Wash. Post. (April 1, 2020, 12:02 a.m.), <https://cutt.ly/5tYT7uo>.

emergency in Wisconsin on March 12, 2020.⁶ Tens of millions across the country are now sheltered in place. As of April 8, 2020, Wisconsin has 2578 confirmed diagnoses of COVID-19, and 92 persons have died from the virus.⁷ Given the limitation of testing capacity, there will be many times more people infected than are presently diagnosed,⁸ and by the time you read this sentence many more people will have been diagnosed and will have died.

20. The virus spreads from person to person through respiratory droplets, close personal contact, and from contact with contaminated surfaces and objects.⁹ There exists no vaccine against COVID-19 and there is no proven medication to treat the infection.¹⁰ Social distancing—deliberately keeping at least six feet of space between persons to avoid spreading illness¹¹—and a vigilant hygiene regimen, including washing hands frequently and thoroughly, are the

⁶ Executive Order 72, Relating to Declaring a Health Emergency in Response to the COVID-19 Coronavirus, March 12, 2020, <https://evers.wi.gov/Documents/EO/EO072-DeclaringHealthEmergencyCOVID-19.pdf>

⁷ <https://www.dhs.wisconsin.gov/outbreaks/index.htm>

⁸ *More than 900 cases of COVID-19 in Wisconsin, with 16 deaths*, WBAY, Mar. 28, 2020 (“Health officials say the real numbers are much higher because they’re trying to limit testing, particularly focusing on health care workers or people in places with more vulnerable people, like nursing homes.”)(<https://www.wbay.com/content/news/569151181.html>)

⁹ Centers for Disease Control and Prevention, *Interim Infection Prevention and Control Recommendations for Patience with Suspected or Confirmed Coronavirus Disease 2019 (COVID-19) in Healthcare Settings*, <https://cutt.ly/ztRAo0X>.

¹⁰ World Health Organization, *Coronavirus*, <https://cutt.ly/ztWyf7e> (“At this time, there are no specific vaccines or treatments for COVID-19.”).

¹¹ Johns Hopkins University, *Coronavirus, Social Distancing and Self-Quarantine*, <https://cutt.ly/VtYYiDG>.

only known effective measures to avoid transmission of COVID-19.¹² Because of the high proportion of asymptomatic and mild infections (estimated *at least* 25%)¹³ and limited testing capacity, the coronavirus is currently spreading in almost every part of Wisconsin.¹⁴ Social distancing is the best way to prevent transmission. In other words, *everyone*, including officials at the Wisconsin Department of Corrections and county jails, must act as if *everyone* has the disease.

21. Neither incarcerated persons nor guards/correctional employees have access to sufficient personal protective equipment (PPE) that could even allow them mitigate the viral spread because PPE is at critically low levels across the country and in Wisconsin.¹⁵ Even with such gear, the spread rate among health care workers who, like guards, work in close contact with infected persons is alarmingly high leaving hospitals short staffed.¹⁶ Wisconsin's already short-

¹² *Dawson v. Asher*, 20-cv-409 (W.D. Wash.) at Doc. No. 5. Declaration of Dr. Jonathan Golob, <https://bit.ly/39SE3e2>

¹³ Decl. of A. Simanek and L. Halinka Malcoe dated April 7, 2020, App. 2. (hereinafter "Epidemiologists Decl.") at ¶10.

¹⁴ Emily Javan, Dr. Spencer J. Fox, Dr. Lauren Ancel Meyers, *Probability of current COVID-19 outbreaks in all US counties*, The University of Texas at Austin,

https://cid.utexas.edu/sites/default/files/cid/files/covid-risk-maps_counties_4.3.2020.pdf?m=1585958755; see also:

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7078829/>

¹⁵ <https://spectrumnews1.com/wi/madison/coronavirus/2020/03/23/milwaukee-county-first-responders-are-seeing-a-shortage-in-personal-protective-gear>

¹⁶ <https://www.opb.org/news/article/coronavirus-covid-19-data-health-care-medical-workers-infection/>; <https://www.nytimes.com/2020/04/03/us/politics/coronavirus-health-care-workers-layoffs.html> .

staffed prisons could present an even higher safety risk if large groups of guards are out sick with COVID-19.

22. Once contracted, COVID-19 can cause severe damage to lung tissue, including a permanent loss of respiratory capacity, and it can damage tissues in other vital organs, such as the heart and liver.¹⁷

23. People over the age of fifty face a greater risk of serious illness or death from COVID-19.¹⁸ In a February 29, 2020 preliminary report, individuals age 50-59 had an overall mortality rate of 1.3%; 60-69-year-olds had an overall 3.6% mortality rate, and those 70-79 years old had an 8% mortality rate.¹⁹

24. People of any age who suffer from certain underlying medical conditions, 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

¹⁷ Epidemiologists Decl. at ¶4.

¹⁸ Xianxian Zhao, et al., Incidence, clinical characteristics and prognostic factor of patients with COVID-19: a systematic review and meta-analysis (March 20, 2020), <https://cutt.ly/etRAkmt>.

¹⁹ *Age, Sex, Existing Conditions of COVID-19 Cases and Deaths Chart*, <https://cutt.ly/ytEimUQ> (data analysis based on WHOChina Joint Mission Report).

disorders, stroke, developmental delay, and asthma, also have an elevated risk.^{20, 21}

25. In many people, COVID-19 causes fever, cough, and shortness of breath. However, for people over the age of fifty or with medical conditions that increase the risk of serious COVID-19 infection, the symptoms can turn severe.²² Most people in higher risk categories who develop serious illness will need advanced support. This requires highly specialized equipment like ventilators that are in limited supply, and an entire team of care providers, including 1:1 or 1:2 nurse to patient ratios, respiratory therapists, and intensive care physicians.²³

26. COVID-19 can also trigger an over-response of the immune system and result in widespread damage to other organs, including permanent injury to the kidneys and neurologic injury.²⁴

²⁰ *Coronavirus disease (COVID-19) advice for the public: Myth busters*, World Health Organization, <https://cutt.ly/dtEiCyc> (“Older people, and people with pre-existing medical conditions (such as asthma, diabetes, heart disease) appear to be more vulnerable to becoming severely ill with the virus.”).

²¹ *Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)*, World Health Organization (Feb. 28, 2020), at 12, <https://cutt.ly/xtEokCt> (finding fatality rates for patients with COVID-19 and co-morbid conditions to be: “13.2% for those with cardiovascular disease, 9.2% for diabetes, 8.4% for hypertension, 8.0% for chronic respiratory disease, and 7.6% for cancer”); Epidemiologists Decl. at 2-2.

²² Epidemiologists Decl. at ¶5.

²³ Golob Dec., *supra* note 12

²⁴ *Id.*

27. These complications can manifest at an alarming pace. Patients can show the first symptoms of infection in as little as two days after exposure, and their condition can seriously deteriorate in as little as five days or sooner.²⁵

28. Even some younger and healthier people who contract COVID-19 may require supportive care, which includes supplemental oxygen, positive pressure ventilation, and in extreme cases, extracorporeal mechanical oxygenation.²⁶

29. Patients who do not die from serious cases of COVID-19 may face prolonged recovery periods, including extensive rehabilitation from neurologic damage, loss of digits, and loss of respiratory capacity.²⁷

B. Prison and Jail Conditions Magnify the Enormous Risks Posed by COVID-19.

30. The Wisconsin Department of Health Services states on its COVID-19 webpage²⁸:

Remember—there are no medications or vaccines to protect us. The only tool we have is physical separation from each other. So we need to use that to stop this virus from spreading further.

²⁵ CDC, *Interim Clinical Guidance*, *supra* note 17.

²⁶ Golob Dec., *supra* note 12 at ¶5.

²⁷ *Id.*

²⁸ Wis. Dept. of Health Services, COVID-19 information, <https://www.dhs.wisconsin.gov/outbreaks/index.htm> (emphasis added).

31. But this sole tool recommended by Wisconsin DHS, physical separation or social distancing, does not exist in prison. People in congregate environments, which are places where people live, eat, and sleep in close proximity, face increased danger of contracting COVID-19. People in prisons and jails live every minute of the day in close proximity to each other.²⁹ For example, at Columbia Correctional Institution, which currently has 2 cases of COVID-19, approximately 150 incarcerated people live in a barracks-style dormitory and many others are double-celled in cells designed for a single person³⁰. It is virtually impossible at current population levels for people who are confined to engage in the necessary social distancing and hygiene required to mitigate the risk of transmission.

32. It takes only one person, for example, a single asymptomatic correctional officer, to infect an entire facility.³¹ These risks created by settings of incarceration are already leading to explosive numbers of cases in some states as demonstrated by dramatic outbreaks in the Cook County Jail³² and Rikers Island

²⁹ The Justice Collaborative, *Explainer: Prisons and Jails are Particularly Vulnerable to COVID-19 Outbreaks*, (emphasis removed) <https://thejusticecollaborative.com/wp-content/uploads/2020/03/TJCVulnerabilityofPrisonsandJailstoCOVID19Explainer.pdf>.

³⁰ Annual Report, Columbia Correctional Institution, <https://doc.wi.gov/Documents/OffenderInformation/AdultInstitutions/CCIAAnnualReport.pdf> (Fiscal Year 2018)

³¹ Epidemiologists Decl. at ¶11.

³² Sam Kelly, *134 inmates at Cook County Jail confirmed positive for COVID-19*, CHICAGO SUN-TIMES (Mar. 30, 2020). <https://cutt.ly/6tYTqi5>

in New York City, where the transmission rate for COVID-19 is estimated to be the highest in the world.³³

33. The danger of this rapid spread inside of correctional spaces is not limited to prisoners. Hundreds of correctional officers in New York, where virus spread started earlier than in Wisconsin, have tested positive for COVID-19, and many more are in quarantine.³⁴ The spread is just starting in Wisconsin, and numbers of infected guards and correctional workers will begin to grow exponentially. Wisconsin is already operating its overcrowded prisons severely understaffed, with forced overtime a regular occurrence.³⁵ A loss of between 20-50% of guards and correctional staff would pose a serious public safety risk.

34. Correctional settings further increase the risk of contracting COVID-19 due to the high numbers of people with chronic, often untreated, illnesses housed in a setting with minimal levels of sanitation, limited access to personal hygiene, limited access to medical care, presence of many high-contact surfaces, and no possibility of staying at a distance from others.³⁶

³³ These numbers likely underestimate the infection rate on Rikers Island, as they do not include the number of people contracted COVID-19 on Rikers Island but who have already been released. The rates of infection rely on publicly released data collected by the Legal Aid Society. See *LEGAL AID SOCIETY, Analysis of COVID-19 Infection Rate in NYC Jails (last visited March 30, 2020, 11:00 AM)*, <https://cutt.ly/RtYTbWd>

³⁴ <https://www.poughkeepsiejournal.com/story/news/local/2020/04/03/coronavirus-ny-correctional-officers-permitted-wear-masks/2940580001/>

³⁵ <https://www.jsonline.com/story/news/politics/2019/01/11/overtime-wisconsin-prisons-tops-50-million/2539860002/>

³⁶ Epidemiologists Decl. ¶13; Swain Decl. ¶¶ (Declaration of Dr. Jaimie Meyer) (noting, *inter alia*, that jails environments have reduced prevention opportunities, increased

35. Correctional facilities house large groups of people together, and move people in groups to eat, recreate, and go to court.³⁷ They frequently have insufficient medical care for the population even outside times of crisis.³⁸ Hot water, soap, and paper towels are often in limited supply. Incarcerated people, rather than professional cleaners, are responsible for cleaning the facilities³⁹ and often are not given appropriate supplies.

36. Numerous public health experts, including Dr. Gregg Gonsalves,⁴⁰ Ross MacDonald,⁴¹ Dr. Marc Stern,⁴² Dr. Oluwadamilola Oladeru and Adam

susceptibility, and are often poorly equipped to diagnose and manage outbreaks of infection disease).

³⁷ See, e.g. Nathalie Baptiste, *Correctional Facilities are the Perfect Incubators for the Coronavirus*, (March 6, 2020), <https://cutt.ly/GtRSi3e>.

³⁸ See, e.g., Steve Coll, *the Jail Health-Care Crisis*, *The New Yorker* (Feb. 25, 2019), <https://cutt.ly/ftERHNg>.

³⁹ See, e.g., Wendy Sawyer, *How much do incarcerated people earn in each state?*, Prison Policy Initiative, (April 10, 2017); <https://cutt.ly/qtER2bh> (noting that “custodial, maintenance, laundry” and “grounds keeping” are among the most common jobs for incarcerated people).

⁴⁰ Kelan Lyons, *Elderly Prison Population Vulnerable to Potential Coronavirus Outbreak*, *Connecticut Mirror* (March 11, 2020), <https://cutt.ly/BtRSxCF>.

⁴¹ Craig McCarthy and Natalie Musumeci, *Top Rikers Doctor: Coronavirus ‘Storm is Coming,’* *New York Post* (March 19, 2020), <https://cutt.ly/ptRSnVo>.

⁴² Marc F. Stern, MD, MPH, *Washington State Jails Coronavirus Management Suggestions in 3 “Buckets,”* *Washington Assoc. of Sheriffs & Police Chiefs* (March 5, 2020), <https://cutt.ly/EtRSm4R>.

Beckman,⁴³ Dr. Anne Spaulding,⁴⁴ Homer Venters,⁴⁵ Jaimie Meyer,⁴⁶ and Josiah Rich⁴⁷ have all strongly cautioned that people booked into and held in jails are likely to face serious, even grave, harm due to the outbreak of COVID-19.

C. Respondents have not met their plain duty to confront the immediate deadly threat COVID-19 poses to incarcerated persons, corrections staff and their families, and communities in Wisconsin.

37. It is of urgent concern that several incarcerated persons and Wisconsin corrections officers have already been diagnosed with COVID-19.⁴⁸ More cases will rapidly follow. The ripple effects of this outbreak endanger everyone in the State; it could exceed the capacity of the DOC's medical services and require the hospitalization of incarcerated people in already-strapped community hospitals.⁴⁹ The outbreak will also spill over into the community, as staff enter and exit correctional facilities on a daily basis.

38. The DOC has revealed that two inmates in the Columbia Correctional Institution and two inmates in the Oshkosh Correctional Institution

⁴³ Oluwadamilola T. Oladeru, et al., *What COVID-19 Means for America's Incarcerated Population – and How to Ensure It's Not Left Behind*, (March 10, 2020), <https://cutt.ly/QtRSYNA>.

⁴⁴ Anne C. Spaulding, MD MPDH, *Coronavirus COVID-19 and the Correctional Jail*, Emory Center for the Health of Incarcerated Persons (March 9, 2020).

⁴⁵ Madison Pauly, *To Arrest the Spread of Coronavirus, Arrest Fewer People*, Mother Jones (March 12, 2020), <https://cutt.ly/jtRSPnk>.

⁴⁶ Meyer Decl., *supra* note 36.

⁴⁷ Amanda Holpuch, *Calls Mount to Free Low-risk US Inmates to Curb Coronavirus Impact on Prisons*, The Guardian (March 13, 2020 3:00 p.m.), <https://cutt.ly/itRSDNH>.

⁴⁸ <https://doc.wi.gov/Pages/COVID19%28Coronavirus%29/COVID19.aspx>

⁴⁹ Swain Decl., ¶¶6-13; Epidemiologists Decl., ¶¶ 9-12

have tested positive, and eleven corrections officers in different correctional facilities across the State have self-reported that they have been diagnosed with the illness.⁵⁰ Two inmates in the Dane County jail and four deputies who work in the jail have tested positive.⁵¹ A nurse in the Milwaukee County Jail has contracted the disease.⁵² One inmate in the Milwaukee House of Corrections has a confirmed case of COVID-19 and several others report the symptoms of the disease.⁵³ The DOC had tested only 91 inmates for the virus as of April 8.⁵⁴ Without widespread testing and prompt isolation measures there could be many more undetected cases.⁵⁵

39. Moreover, a recent study estimated that, given the prevalence of mild and asymptomatic cases, the probability that the virus is spreading

⁵⁰ Wis. Dept. of Corrections COVID-19 information page, <https://doc.wi.gov/Pages/COVID19%28Coronavirus%29/COVID19.aspx>.

⁵¹ *2 more Dane County deputies test positive for COVID-19 coronavirus*, Wisconsin State Journal, April 1, 2020 (https://madison.com/wsj/news/local/crime-and-courts/2-more-dane-county-deputies-test-positive-for-covid-19-coronavirus/article_d94abef1-a5a7-5ea9-9b57-106084583a51.html).

⁵² *Nurse at Milwaukee County Jail tests positive for COVID-19, sheriff's office says*, Fox6Now, April 3, 2020 <https://fox6now.com/2020/04/03/nurse-at-milwaukee-county-jail-tests-positive-for-covid-19-sheriffs-office-says/>

⁵³ M. Paukner, *Milwaukee County inmate tests positive for COVID-19*, Wis. L. Jnl., Apr. 3, 2020 <https://wislawjournal.com/2020/04/03/milwaukee-county-inmate-tests-positive-for-covid-19/>

⁵⁴ [https://doc.wi.gov/Pages/COVID19\(Coronavirus\)/COVID19TestingDashboard.aspx](https://doc.wi.gov/Pages/COVID19(Coronavirus)/COVID19TestingDashboard.aspx)

⁵⁵ *'There's no protection here whatsoever': As coronavirus emerges at Wisconsin prisons, workers and inmates try to stop the spread*, Milw Journal-Sentinel, April 4, 2020 <https://www.jsonline.com/story/news/2020/04/04/coronavirus-found-wisconsin-prisons-where-spread-hard-avoid/2946429001/>.

undetected in a community where there are zero detected cases is almost 10%, if there is a single detected case the probability that it is already spreading is 50%.⁵⁶

40. Since Wisconsin has about 23,000 incarcerated persons, 12,000 persons held in local jails, and about 7,650 correctional employees, and those employees have at least one other adult household member, Wisconsin will see a significant increase in the number of infections in a relatively short period of time. For example, in New York City's jails, the virus is spreading at a rate seven times higher than in the remainder of the city. Here in Wisconsin, public health experts estimate that it is not unreasonable to expect that, absent social distancing, there will be a 60% infection rate in 4 months.⁵⁷ Such a spread will tax the already limited hospital bed capacity in Wisconsin, especially in rural jurisdictions where prisons are located.

41. An outbreak of COVID-19 in Wisconsin prisons could generate a need for more hospital and ICU beds than the available capacity.⁵⁸ Each additional person needing intensive care who cannot receive an ICU bed may die.

42. The situation in Wisconsin prisons is greatly exacerbated by significant overcrowding. As of March 27, 2020, the DOC reported that it held

⁵⁶ Emily Javan, Dr. Spencer J. Fox, Dr. Lauren Ancel Meyers, *Probability of current COVID-19 outbreaks in all US counties*, The University of Texas at Austin, https://cid.utexas.edu/sites/default/files/cid/files/covid-risk-maps_counties_4.3.2020.pdf?m=1585958755.

⁵⁷ Swain Decl. ¶10.

⁵⁸ Swain Decl. , ¶¶6-9 . Epidemiologists, ¶9.

23,288 adult inmates in facilities with a design capacity of 17,815, thus exceeding their design capacity by more than 30%.⁵⁹ Many individual prisons are operating at even higher rates of overcrowding, for example Oakhill Correctional Facility is operating at 120% over capacity.⁶⁰ In such overcrowded conditions, rapid disease spread becomes an imminent danger.

43. Moreover, a significant number of persons housed in those overcrowded facilities are the most vulnerable to Covid-19 infection and death. As of February 2020, there were **1,613 inmates in Wisconsin prisons aged 60 or older**, the highest risk group for fatal outcomes from COVID-19.⁶¹ Incarcerated persons are also more likely than the general population to have medical conditions which heighten their risk for death from COVID-19.⁶²

44. Petitioners Sussek and Ninneman both fall in higher risk groups. Sussek suffers from kidney disease and Ninneman has cardiac disease. And the outbreak of COVID-19 within the prison system poses a mortal risk for both of them.

45. Persons with mental disorders, a population for whom Petitioner Disability Rights Wisconsin advocates, are more likely to have high risk

⁵⁹ Wis. Dept. of Corrections Weekly Population Report, March 27, 2020 (<https://doc.wi.gov/DataResearch/WeeklyPopulationReports/03272020.pdf>).

⁶⁰ <https://doc.wi.gov/DataResearch/DataAndReports/OCIInstitutionalFactSheet.pdf>

⁶¹ DAI At-a-Glance, Wis. Dept. of Corrections, Feb. 2020, <https://doc.wi.gov/DataResearch/DataAndReports/DAIAtAGlance.pdf>

⁶² Epidemiologists Decl. at ¶15.

conditions⁶³ and generally more susceptible to infections such as COVID-19.⁶⁴ Possible reasons include cognitive impairment, little awareness of risk, and diminished efforts regarding personal protection in patients, as well as confined conditions.⁶⁵ The DOC reports that 39% of male inmates and 88% of female inmates have a mental health condition.⁶⁶

46. Advocates and public health experts have been urging Respondents to promptly reduce jail and prison populations for weeks. On March 18, 2020, counsel for Petitioners sent Respondents and other Wisconsin officials a letter urging such reductions because of the emerging COVID-19 threat⁶⁷. On March 24, 2020, the Wisconsin Public Health Association and the Wisconsin Association

⁶³ Aarhus University. "Mentally ill die many years earlier than others." ScienceDaily, 25 October 2019. www.sciencedaily.com/releases/2019/10/191025094013.htm; Am Fam Physician. 2010 Mar 1;81(5):617-622 ("All antipsychotic medications are associated with an increased likelihood of sedation, sexual dysfunction, postural hypotension, cardiac arrhythmia, and sudden cardiac death."); C. Mangurian, et.al., *Diabetes and Prediabetes Prevalence by Race and Ethnicity Among People With Severe Mental Illness*, Diabetes Care 2018 May; dc180425. <https://doi.org/10.2337/dc18-0425> ("People with severe mental illness are more than twice as likely to have Type 2 diabetes, with even higher risks among patients who are African American or Hispanic").

⁶⁴ Yao, et.al., *Patients with mental health disorders in the COVID-19 epidemic*, The Lancet, April 1, 2020, [https://www.thelancet.com/journals/lanpsy/article/PIIS2215-0366\(20\)30090-0/fulltext](https://www.thelancet.com/journals/lanpsy/article/PIIS2215-0366(20)30090-0/fulltext)

⁶⁵ *Id.*

⁶⁶ <https://doc.wi.gov/DataResearch/DataAndReports/DAIAtAGlance.pdf>

⁶⁷ Letter from ACLU of Wisconsin to Criminal Justice System Stakeholders, March 18, 2020, https://www.aclu-wi.org/sites/default/files/aclu_coronavirus_criminal_justice_-_wisconsin.pdf

of Local Health Departments and Boards wrote Gov. Evers regarding the “urgent need to reduce population density” in Wisconsin’s prisons and jails.⁶⁸

47. On March 20, 2020, Governor Evers issued an emergency order to the Department of Corrections to halt any new admissions into the state’s prison system.⁶⁹ This moratorium, however, does nothing to improve the conditions of an already overcrowded prison system without significant removals of vulnerable inmates. The moratorium also leaves county jails to deal with inmates who would otherwise have entered the State system.

48. Secretary Carr recognized the unique risks of a prison setting in an interview on April 3, 2020, stating “because of overcrowding and our confined spaces ... we have many challenges that we have to deal with when it comes to dealing with any sort of pandemic.” Interview of Sec. Kevin A. Carr, WisconsinEye, April 3, 2020.⁷⁰ However, in the same interview, Secretary Carr stated that none of the contingency plans for dealing with the epidemic include removal of any inmates outside of the secure perimeter of Department of Corrections facilities. *Id.*

⁶⁸ Letter from WPHA and WALHDB to Gov. Evers, March 24, 2020, https://cdn.ymaws.com/www.walhdab.org/resource/resmgr/pa_committee/WPHA_WALHDAB_COVID-19_Decarc.pdf

⁶⁹ Emergency Order #9, Office of Wis. Governor, March 20, 2020, <https://evers.wi.gov/Documents/COVID19/EMO09-DOC.pdf>.

⁷⁰ <https://wiseye.org/2020/04/03/newsmakers-covid-19-update-dept-of-corrections-sec-kevin-carr/>.

49. The Wisconsin Parole Commission (“WPC”) reviews release on parole for “old law” inmates sentenced before December 31, 1999. By definition, these are older inmates who have been incarcerated for more than 20 years. But in the March 4, 2020 meeting of the WPC, there was no discussion of the threat of COVID-19 and the necessity to consider release for vulnerable parole-eligible inmates, even though the pandemic was already surging in the United States.⁷¹ The April 1, 2020 meeting of the WPC was cancelled.

50. The DOC has reduced the prison population by a mere 304 inmates since the governor’s March 12 declaration of a public health emergency, or 1.3%.⁷² Despite the overwhelming public health emergency, Respondents have permitted Wisconsin’s correctional facilities to remain drastically overcrowded with no social distancing.

ARGUMENT

51. As noted above, this Court has the power to entertain an original action that responds to an urgent, statewide crisis like this one. The threat posed by COVID-19 is imminent and real, and this Court must act because Respondent

⁷¹ Minutes, March 4, 2020 meeting, Wis. Parole Comm., <https://doc.wi.gov/Documents/AboutDOC/ParoleCommission/03042020PCMeetingMinutes%28Final%29.pdf>

⁷² Wis. Dept. of Corrections Weekly Population Reports, comparing March 13 and April 3 reports, <https://doc.wi.gov/Pages/DataResearch/DataAndReports.aspx>

officials have failed in their clear duty to protect incarcerated persons and Wisconsin citizens at large.

A. Respondents Have The Power And Plain Duty to Remove Incarcerated Persons From the Threat of COVID-19 in Confinement But Have Not Used That Power.

52. This Petition does not seek the modification of a sentence of any person convicted and sentenced to serve a term in the Wisconsin corrections system. This Petition instead asks this Court to address the constitutional violations suffered by petitioners through a writ of mandamus and injunctive relief requiring Respondents to use their respective powers granted by statute to remove prisoners out of harm's way.

53. The Governor of the State of Wisconsin has an important power of reprieve granted to him under Article 5, sect. 6 of the State Constitution. Although Petitioners are unaware of a Wisconsin Governor ever using this power, the extraordinary emergency facing the State calls for it now. A reprieve stays a sentence from being carried out for a period of time. See *Commonwealth v. Williams*, 129 A.3d 1199, 1217 (Pa. 2015) (reprieve “means the temporary suspension of the execution of a sentence. We find no limitation on the executive reprieve power relating to the duration of the reprieve, so long as it is temporary in nature and operates only for an interval of time.”). The Governor has the power to issue reprieves for sentenced persons for the duration of this health emergency after which their sentence, if appropriate, could be reinstated. The

Governor also has the power to grant pardons and commute sentences under the same provisions of the constitution.

54. The Secretary of Corrections of the State of Wisconsin is granted by statute a power to deal with emergencies. Section 304.115 of the Wisconsin Statutes reads: “When an emergency exists which in the opinion of the secretary makes it advisable, the secretary may permit the temporary removal of a convicted person for such period and upon such conditions as the secretary determines.”

55. The Chairperson of the Wisconsin Parole Commission is responsible for the administrative functions and supervision of “the [parole] commission and its activities and shall be the final parole-granting authority” Wis. Stat. § 304.01(1).

B. High Courts in Other States Have Already Acted to Reduce the Threat of the Virus.

56. The situation facing this Court and the State’s incarceration system is one faced by high courts throughout the country. This is a pandemic which respects no geographic boundaries.

57. Courts around the country have used their powers to grant the kinds of relief sought in this petition:

- On March 22, 2020, the Supreme Court of New Jersey ordered the release of *all* prisoners serving county jail sentences.⁷³
- On April 3, 2020 the Pennsylvania Supreme Court ordered the chief judge of all counties to “immediately” engage in a review of the “current capabilities of their county correctional institutions . . . to address the spread of COVID-19,” “to ensure that the county correctional institutions in their districts address the threat of COVID-19,” as necessary “to identify individuals of incarcerated persons for potential release,” and “to undertake efforts to limit the introduction of new inmates into the county prison system.”⁷⁴
- On April 3, 2020 the Massachusetts Supreme Court ruled that pre-trial detainees not charged with certain violent offenses, as well as incarcerated individuals held on technical probation and parole violations, is entitled to a rebuttable presumption of release.⁷⁵

⁷³ *In the Matter of the Request to Commute or Suspend County Jail Sentences*, No. 082430 (N.J. Mar.22, 2020), <https://www.njcourts.gov/notices/2020/n200323a.pdf?c=9cs>. The order provided a mechanism for prosecutors, within 24 to 48 hours, object to the release of specific prisoners who “would pose a significant risk to the safety of the inmate or the public,” with such objections to be considered by judges or special masters appointed by the Supreme Court.

⁷⁴ *In re: The Petition of the Pennsylvania Prison Society et al.*, No. 70 MM 2020 (Pa. Apr. 3, 2020).

⁷⁵ See Deborah Becker, *Mass. High Court Rules Some Prisoners Will Be Eligible For Release Due To COVID-19*, WBUR News (Apr. 3, 2020), <https://www.wbur.org/news/2020/04/03/sjc-prisonersemergency-petition-ruling>.

- The Kentucky Supreme Court’s Chief Justice told state judges and court clerks to release jail inmates “as quickly as we can,” noting that “jails are susceptible to worse-case scenarios due to the close proximity of people and the number of pre-existing conditions,” and that courts have the responsibility “to work with jailers and other county officials to safely release as many defendants as we can as quickly as we can.”⁷⁶
- The Chief Justice of the South Carolina Supreme Court ordered that everyone held in jail on bond in a non-capital case be released, unless there exists an “unreasonable danger” or “extreme flight risk.”⁷⁷

58. There are many similar court actions. In the Appendix at 1 is a listing of courts across the country which have taken action to reduce incarcerated populations in response to the COVID-19 crisis.

59. At the federal level, Attorney General William Barr, who has overall supervision of the federal Bureau of Prisons, utilized an emergency power on April 3, 2020, comparable to the emergency power under section 304.115,

⁷⁶ Kyle C. Barry, *Some Supreme Courts Are Helping Shrink Jails to Stop Outbreaks. Others Are Lagging Behind*, *The Appeal* (Mar. 25, 2020), <https://theappeal.org/politicalreport/some-supreme-courts-are-helping-shrink-jails-coronavirus/>; John Cheves, *Chief Justice Pleads for Kentucky Inmate Release Ahead of COVID-19 but Progress Slow*, *Lexington Herald Leader* (Mar. 23, 2020), <https://www.kentucky.com/news/coronavirus/article241428266.html>.

⁷⁷ Memorandum from Donald W. Beatty, Chief Justice of South Carolina Supreme Court, to Magistrates, Municipal Judges, and Summary Court Staff (Mar. 16, 2020), <https://www.sccourts.org/whatsnew/displayWhatsNew.cfm?indexId=2461>.

Wis. Stats., to order federal prisons to remove vulnerable inmates to home confinement in response to the COVID-19 outbreak.⁷⁸

60. In response to this public health crisis, this Court has already closed courthouses, canceled trials, and ordered hearings by videoconference in order to protect court staff and the public. The relief sought by this petition is a necessary corollary to this Court's order in *In Re The Matter Of Jury Trials During The Covid-19 Pandemic*, issued March 22, 2020, where the Court suspended all criminal and civil jury trial for two months until May 22, 2020. In that case, this Court stated:

The reason for these orders and guidelines is to avoid or decrease the transmission of COVID-19 from one person to another, as the disease may cause serious health consequences for the individual and may place undue strain on the health systems of this state and the country. In addition, there is a consensus among health providers and government health officials that certain categories of people are most at risk of suffering severe health consequences, including a higher risk of mortality, from COVID-19. Those higher-risk categories include older individuals and persons with pre-existing health conditions.

Based on this finding, this Court suspended the important constitutional right of jury trial to protect the health and well-being of jurors, court personnel and litigants. Similarly, this Court suspended almost all in-person proceedings in the trial and appellate courts in the State and commanded the use of video and tele-

⁷⁸ Memorandum from AG Barr to Director, Bureau of Prisons, April 3, 2020, <https://politi.co/39XyDPi>

conferencing facilities. *In re Remote Hearings During The Covid-19 Pandemic*, issued March 22, 2020.

61. This petition asks the Court to exercise those same powers to provide similar protection to the incarcerated persons in this State.

C. Subjecting non-dangerous prisoners to a likely outbreak of COVID-19 raises significant constitutional concerns.

62. The emergency in front of this Court is not just a health emergency to be left to medical professionals and administrators. It is an emergency of constitutional dimensions. It implicates the fundamental right of persons to be free of cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution and Article I, Section 6 of the Wisconsin Constitution and to receive due process. It involves the right not to have a criminal sentence be turned into a death sentence as the virus ravages correctional facilities and state officials refuse to release inmates to get out of the path of this disease.

63. Corrections officials have a constitutional obligation to provide for detainees' reasonable safety and to address their serious medical needs. *See DeShaney v. Winnebago County Dept. of Soc. Services*, 489 U.S. 189, 200 (1989) (“[W]hen the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state

action set by the Eighth Amendment and the Due Process Clause.”); *Youngberg v. Romeo*, 457 U.S. 307, 315–16, 324 (1982) (the state has an “unquestioned duty to provide adequate . . . medical care” for detained persons); *Wilson v. Seiter*, 501 U.S. 294, 300 (1991); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Brown v. Plata*, 563 U.S. 493, 531-32 (2011); *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (remanding for determination whether correctional officer violated Eighth Amendment by failing to prevent “a substantial risk of serious harm”).⁷⁹

64. This obligation requires corrections officials to protect detainees from infectious diseases like COVID-19; officials may not wait until someone tests positive for the virus, and an outbreak begins. *Helling v. McKinney*, 509 U.S. 25, 33-34 (1993) (“That the Eighth Amendment protects against future harm to inmates is not a novel proposition. . . . 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”); *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (“[C]orrectional officials have an affirmative obligation to protect [forcibly confined] inmates from infectious disease”); *see also Farmer*, 511 U.S. at 833 (“[H]aving stripped [prisoners] of virtually every means of self-

⁷⁹ Petitioners seek relief for both pre-trial and post-conviction detainees. The Fourteenth Amendment’s Due Process Clause governs conditions-of-confinement claims like these for pretrial detainees, while the Eighth Amendment governs post-conviction detainees. While it is clear that pretrial detainees are presumed innocent and therefore merit greater protection, *see Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979), the distinction is irrelevant here: the harms of actual and potential COVID contraction alleged herein clearly satisfy the Eighth Amendment’s more restrictive standard.

protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course.”).

65. Prison and jail officials violate this affirmative obligation by showing “deliberate indifference” to the substantial risk of serious harm. *Wilson*, 501 U.S. at 303. With respect to an impending infectious disease like COVID-19, deliberate indifference exists when corrections officials “ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year,” even when “the complaining inmate shows no serious current symptoms.” *Helling*, 509 U.S. at 33 (holding that a prisoner “states a cause of action . . . by alleging that [corrections officials] have, with deliberate indifference, exposed him to conditions that pose an unreasonable risk of serious damage to future health”); *see also Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (citing *Farmer*, 511 U.S. at 842) (court “may infer the existence of [deliberate indifference] from the fact that the risk of harm is obvious”); *Powers v. Snyder*, 484 F.3d 929, 931 (7th Cir.2007) (“knowingly exposing a prisoner to hepatitis or other serious diseases could [] amount to cruel and unusual punishment in violation of the federal Constitution.”).⁸⁰

⁸⁰ See also *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (“[C]orrectional officials have an affirmative obligation to protect [forcibly confined] inmates from infectious disease”); *Hutto v. Finney*, 437 U.S. 678, 682 (1978) (noting that among the prison conditions for which the Eighth Amendment required a remedy was placement of inmates in punitive isolation under conditions where infectious diseases could spread easily); *Gates v. Collier*, 501 F.2d 1291, 1300–03 (5th Cir.1974) (court affirmed the district court’s holding that allowing “[s]ome inmates with serious contagious diseases ... to

66. Here, COVID-19 is “sure or very likely to cause serious illness,” and even waiting to “see what happens” or to attempt internal mitigation efforts may be too late. *See supra* ¶¶30-42. In other words, the harmful “condition of confinement” is confinement in typical prison and jail settings at current population levels with COVID-19 knocking at the door. As outlined in the Swain and Epidemiologist Declarations submitted with this Petition, there are no mitigation efforts that the prisons could undertake that would better prevent the risk of infection—and potential spread to the non-incarcerated community—other than immediate removal of significant numbers of prisoners.⁸¹

67. Detention and imprisonment during the pandemic not only deprive individuals of their freedom, but also puts them at serious risk of loss of life or permanent injury. These significant risks, not accounted for in sentencing or determinations of pretrial detention, implicate substantive and procedural due process rights that demand coordinated, immediate, and comprehensive action by the government. Such action should be guided by both public safety and public health considerations, including the correctional facilities’ inability to adequately

mingle with the general prison population,” alongside maintaining a host of other unsanitary and inhumane conditions, “constitute[d] cruel and unusual punishment.”) (cited with approval in *Rhodes v. Chapman*, 452 U.S. 337, 352 n. 17, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981); *DeGidio v. Pung*, 920 F.2d 525, 531, 533 (8th Cir.1990) (prison staffs “serious and persistent instances of negligent and substandard efforts to remedy the tuberculosis epidemic ... evidenced deliberate indifference to the inmates' serious medical needs.”) (quotation marks omitted).

⁸¹ Epidemiologists Decl., App. 2; Swain Decl., App. 3.

prepare, respond, and operate in the event of a COVID-19 outbreak due to limited resources and the overcrowded conditions in jails and prisons. Given the stakes and the significant risks posed by COVID-19 to the more than 30,000 people held in jails and prisons by the State of Wisconsin it is clear that significant action to prevent massive and unnecessary harm and loss of life is both necessary and appropriate.

RELIEF SOUGHT BY THIS PETITION

As a consequence of the violation of Respondents' violation of their plain duty under the Wisconsin and U.S. constitutions to avoid cruel and unusual punishment, Petitioners ask this Court to enter a writ of mandamus and injunction:

1. Appointing a Special Master to oversee immediate actions of the Respondents to achieve sufficient removal of inmates in Wisconsin correctional facilities to a level such that:
 - a. No person is held in a cell with another person;
 - b. Where individuals are housed in dormitory spaces there is a minimum six feet separation between every bed;
 - c. Compliance with all other social distancing guidelines is achieved.

Respondents shall utilize their respective powers of reprieve, pardon, clemency, emergency removal, and parole in order to reduce prison populations as indicated by the Special Master.

2. In complying with paragraph 1 above, Respondents shall give priority to the removal of vulnerable persons from correctional facilities including:

a. individuals over the age of 60 and thus at increased risk of severe COVID-19 complications and death; and

b. individuals who have a condition or disease that puts them at increased risk of severe COVID-19 complications and death, including cardiovascular and respiratory disease, diabetes, liver and kidney disease and diseases which compromise the immune system.

3. Ordering the Department of Corrections and all Sheriffs in the State to adhere to the CDC's Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in all correctional facilities and jails.

4. Ordering all Circuit Courts to consider the serious health risk posed by detention to the defendant, other incarcerated individuals, and the community in bail determination hearings, supervision and parole revocation hearings, and sentencing.

5. Any inmate, who does not wish—based on safety, health, or housing concerns—to be removed from detention, would not be removed.

CONCLUSION

For the reasons set forth above the Petitioners request that this Court take jurisdiction of this matter as an original action, granting the requested relief and ruling on the legal matters raised herein.

Respectfully submitted this 10th day of April, 2020.

Electronically signed by
Ellen Henak

Electronically signed by
R. Timothy Muth

Ellen Henak, SBN 1012490
Henak Law Office, S.C.
316 N. Milwaukee St., #535
Milwaukee, WI 53202
414-283-9300

R. Timothy Muth, SBN 1010710
Laurence J. Dupuis, SBN 1029261
Emma Shakeshaft, SBN 10920046
Asma Kadri Keeler, SBN 1114761

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Milwaukee WI 53202
(414) 272-4032

CERTIFICATE OF LENGTH

This Petition and Memorandum were prepared with a proportional serif font. The word count is 7937 words.

Electronically signed by

R. Timothy Muth, SBN1010710

STATE OF WISCONSIN SUPREME COURT

WISCONSIN ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS; DISABILITY RIGHTS
WISCONSIN, INC.; CRAIG SUSSEK; and
RAYMOND D. NINNEMAN,

Petitioners,

No. _____

TONY EVERS, Governor of the State of
Wisconsin, KEVIN A. CARR, Secretary of the
Wisconsin Department Of Corrections, and JOHN
TATE II, Chairman Of the Wisconsin Parole
Commission,

Respondents.

APPENDIX

1. Chart of Nationwide Court Actions Addressing COVID-19
in Jails and Prisons.....App. 1-1
2. Declaration of Amanda M. Simanek, MPH, PhD, and
Lorraine Halinka Malcoe, MPH, PhD dated April 9, 2020.....App. 2-1
3. Declaration of Geoffrey Robert Swain, MD, MPH dated April 9, 2020.....App. 3-1

Appendix: Court Actions Across the Country to Reduce Incarceration in Light of Covid-19¹

State	Judicial Body	Forum	Nature of Relief
Alabama	Circuit Court for the 19 th Judicial Circuit of Alabama	Administrative order	<ul style="list-style-type: none"> Judge Fuller ordered “all inmates currently held on appearance bonds of \$5,000.00 or less be immediately released on recognizance with instructions to personally appear at their next scheduled court appearance.”²
Arizona	Coconino County court system and jail, Judge Dan Slayton, along with other county judges	Court order	<ul style="list-style-type: none"> As of March 20, 2020, Judge Dan Slayton and other county judges have released around 50 people who were held in the county jail on non-violent charges.³
California	Supreme Court of California, Chief Justice Tani Cantil-Sakauye	Advisory	<ul style="list-style-type: none"> The Chief Justice issued guidance encouraging the state’s superior courts to, among other things: <ul style="list-style-type: none"> “Lower bail amounts significantly for the duration of the coronavirus emergency, including lowering the bail amount to \$0 for many lower level offenses.” “Consider a defendant’s existing health conditions, and conditions existing at the anticipated place of confinement, in setting conditions of custody for adult or juvenile defendants.” “Identify detainees with less than 60 days in custody to permit early release, with or without supervision or community-based treatment.”⁴
	Sacramento Superior Court, Judge Hom	Order	<ul style="list-style-type: none"> The Court entered a standing order authorizing their sheriff to release those within 30 days of release, regardless of crime.⁵
Hawai‘i	Supreme Court of the State of Hawai‘i	Order and Appointment of Special Master	<ul style="list-style-type: none"> The court appointed a Special Master who will “work with the parties in a collaborative and expeditious manner to address the issues raised in the two petitions and to facilitate a resolution while protecting public health and public safety.”⁶

Kentucky	Kentucky, Chief Justice John Minton Jr.	Letter to state judges and court clerks	<ul style="list-style-type: none"> Chief Justice John Minton, Jr. told state’s judges and court clerks to release jail inmates “as quickly as we can” noting, “jails are susceptible to worse-case scenarios due to the close proximity of people and the number of pre-existing conditions,” and that courts have the responsibility “to work with jailers and other county officials to safely release as many defendants as we can as quickly as we can.”⁷
Maine	State of Maine Superior Court, Chief Justice Mullen and District Court Chief Judge Sparaco and Deputy Chief Judge French	Emergency Order	<ul style="list-style-type: none"> The Superior Court and District Court ordered all trial courts to immediately vacate all outstanding warrants for unpaid fines, restitution, fees, and failures to appear.⁸
Massachusetts	Justice Gaziano, Commonwealth of Massachusetts Supreme Judicial Court	Order	<ul style="list-style-type: none"> The Supreme Judicial Court ruled that people held pretrial on bail and have not been found dangerous or charged with a violent or otherwise excluded offenses are entitled to a hearing within two business days of filing their motions. At the hearings, they will be entitled to a rebuttable presumption of release. The court also ordered the Department of Correction and each sheriff to provide daily reports on the number of COVID-19 tests, the number of positive results for all people in their custody, correctional officers, and staff; as well as the number of people released pursuant to the order’s procedures and guidance. The court urged the parole board to expedite hearings of parole-eligible individuals.⁹
Michigan	Chief Justice Bridget M. McCormack, Michigan Supreme Court	Joint Statement	<ul style="list-style-type: none"> In a Joint statement, Chief Justice McCormack urged judges to “use the statutory authority they have to reduce and suspend jail sentences for people who do not pose a public safety risk[.]... release far more people on their own recognizance while they await their day in court... [a]nd judges should use probation and treatment programs as jail alternatives.¹⁰

Montana	Supreme Court of Montana, Chief Justice McGrath	Letter to Judges	<ul style="list-style-type: none"> Chief Justice of the Montana Supreme Court urged judges to “review your jail rosters and release, without bond, as many prisoners as you are able, especially those being held for non-violent offenses.”¹¹
New Jersey	New Jersey Supreme Court, Chief Justice Rabner	Consent Order	<ul style="list-style-type: none"> In New Jersey, after the Supreme Court ordered briefing and argument on why it should not order the immediate release of individuals serving county jail sentences, the Attorney General and County Prosecutors agreed to create an immediate presumption of release for every person serving a county jail sentence in New Jersey. The court amended its consent order to add in procedures for inmates who lacked a safe place to go upon release.¹²
New York	New York State Supreme Court, Bronx County, Justice Doris M. Gonzales	Judicial ruling based on writ of habeas corpus	<ul style="list-style-type: none"> In a habeas petition brought by the Legal Aid Society, a Justice Doris M. Gonzales ordered the release of 106 individuals currently held at Rikers Island on a non-criminal technical parole violation. These individuals were selected in the petition by virtue of their age and/or underlying medical condition.¹³
Ohio	New York Supreme Court Justice Mark Dwyer	Judicial ruling based on writ of habeas corpus	<ul style="list-style-type: none"> In a habeas petition brought by the Legal Aid Society, a Justice Mark Dwyer ordered the release of 16 individuals currently held at Rikers Island on pretrial detention or parole violation. These individuals were selected in the petition by virtue of their age and/or underlying medical condition.¹⁴
Ohio	Ohio Supreme Court, Chief Justice Maureen O'Connor	News Conference	<ul style="list-style-type: none"> Chief Justice O'Connor urged “judges to use their discretion and release people held in jail and incarcerated individuals who are in a high-risk category for being infected with the virus.”¹⁵
South Carolina	Supreme Court of South Carolina, Chief Justice Beatty	Memorandum	<ul style="list-style-type: none"> The Chief Justice instructed that “any person charged with a non-capital crime shall be ordered released pending trial on his own recognizance without surety, unless an unreasonable danger to the community will result or the accused is an extreme flight risk.”¹⁶
Tennessee	Supreme Court of Tennessee	Court Order	<ul style="list-style-type: none"> The Chief Justice of the Tennessee Supreme Court ordered local judges to come up with plans for reducing their prison and jail populations by March 30th.¹⁷

Texas	Travis County, Texas, Judges	Individual Court Orders	<ul style="list-style-type: none"> Travis County has begun releasing some defendants in custody with underlying health conditions, to reduce the potential spread of COVID-19 in the county’s jails. After Austin saw its first positive cases of COVID-19, judges in the county nearly doubled its release of people from local jails on personal bonds, with one judge alone reversing four bond decisions after “balancing this pandemic and public health safety of inmates against what they’re charged with.”¹⁸ The Chief Justice of the Utah Supreme Court ordered that for defendants in-custody on certain misdemeanor offenses, “the assigned judge must reconsider the defendant’s custody status and is encouraged to release the defendant subject to appropriate conditions.”¹⁹
Utah	Utah Supreme Court and Utah Judicial Council, Chief Justice Durrant	Administrative Order	<ul style="list-style-type: none"> Chief Justice Stephens ordered judges not to issue bench warrants for failure to appear, “unless necessary for the immediate preservation of public or individual safety” and “to hear motions for pretrial release on an expedited basis without requiring a motion to shorten time.” Additionally, for populations designated as at-risk or vulnerable by the Centers for Disease Control, the COVID-19 crisis is presumed to be a material change in circumstances to permit amendment of a previous bail order or to modify conditions of pre-trial release.²⁰ The Chief Justice instructed judges to issue summonses instead of bench warrants, unless public safety compels otherwise.²¹
Washington	Washington Supreme Court, Chief Justice Stephens	Amended Order	<ul style="list-style-type: none"> The Court granted temporary release for 90 days, pursuant to 18 U.S.C. § 3142 (i), which authorizes discretionary temporary release when necessary for a person’s defense or another compelling reason. Judge Selna held that the defendant’s age, and medical conditions, which place him in the population most susceptible to COVID-19, constituted “another compelling reason” and granted his temporary release.²²
Wyoming	Wyoming Supreme Court, Chief Justice Davis	Order	
Federal Criminal Detention	C.D. Cal, Judge James V. Selna	Minute Order	

D. Ct., Judge Jeffrey A. Meyer	Order	<ul style="list-style-type: none"> • Judge Meyer ordered the release of defendant stating that “the conditions of confinement at Wyatt are not compatible” with current COVID-19 public health guidance concerning social distancing and avoiding congregating in large groups. Judge Meyer is one of four federal judges in Connecticut who has released inmates in connection with the COVID-19 pandemic.²³
D.D.C., Judge Randolph D. Moss	Minute Order	<ul style="list-style-type: none"> • Judge Moss released defendant, despite acknowledging offense charged—marijuana distribution and felon in possession—“is serious” because among other factors mitigating public safety concerns “incarcerating the defendant while the current COVID-19 crisis continues to expand poses a greater risk to community safety than posed by Defendant’s release to home confinement.”²⁴
D.D.C., Judge Randolph D. Moss	Memorandum Opinion	<ul style="list-style-type: none"> • Judge Moss released defendant while awaiting trial after weighing the risk to the public of releasing defendant [charged with distribution of child pornography] directly against risk to community safety if defendant remained incarcerated in light of the COVID-19 pandemic.²⁵
D. Nev., Judge Jones	Opinion and Order	<ul style="list-style-type: none"> • Judge Jones delayed defendant’s date to surrender to begin his intermittent confinement by a minimum of 30 days because “[i]n considering the total harm and benefits to prisoner and society . . . temporarily suspending [defendant’s] intermittent confinement would appear to satisfy the interests of everyone during this rapidly encroaching pandemic.” In coming to this conclusion, the court placed weight on the fact that “incarcerated individuals are at special risk of infection, given their living situations, and may also be less able to participate in proactive measures to keep themselves safe; because infection control is challenging in these settings.”²⁶
D. S.C., Judge David C. Norton	Order	<ul style="list-style-type: none"> • Judge Norton granted compassionate release for a 73-year-old with severe health conditions under the First Step Act, “[g]iven defendant’s tenuous health condition and age, remaining incarcerated during the current global pandemic puts him at even higher risk for severe illness and possible death, and Congress has expressed its desire for courts to [release federal inmates who are vulnerable to COVID-19].”²⁷

N.D. Cal., Judge Vince Chhabria	Sua Sponte Order	<ul style="list-style-type: none"> • Judge Chhabria issued a sua sponte decision extending defendant’s surrender date from June 12, 2020 to September 1, 2020 stating: “By now it almost goes without saying that we should not be adding to the prison population during the COVID-19 pandemic if it can be avoided . . . To avoid adding to the chaos and creating unnecessary health risks, offenders who are on release and scheduled to surrender to the Bureau of Prisons in the coming months should, absent truly extraordinary circumstances, have their surrender dates extended until this public health crisis has passed.”²⁸
N.D. Cal., Judge Hixson	Order	<ul style="list-style-type: none"> • Judge Hixson released a 74-year old in light of COVID-19 holding “[t]he risk that this vulnerable person will contract COVID-19 while in jail is a special circumstance that warrants bail. Release under the current circumstances also serves the United States’ treaty obligation to Peru, which – if there is probable cause to believe Toledo committed the alleged crimes – is to deliver him to Peru alive.”²⁹
E.D. Mi., Judge Levy	Order	<ul style="list-style-type: none"> • Judge Levy issued an order temporarily revoking detention of the defendant due to the “danger posed to Defendant in the Saginaw County Jail by the COVID-19 pandemic.”³⁰
S.D.N.Y., Judge Paul A. Engelmayer	Amended Order	<ul style="list-style-type: none"> • Judge Engelmayer granted defendant temporary release from custody, pursuant to 18 U.S.C. § 3142(i), “based on the unique confluence of serious health issues and other risk factors facing this defendant, including but not limited to the defendant’s serious progressive lung disease and other significant health issues, which place him at a substantially heightened risk of dangerous complications should [h]e contract COVID-19 as compared to most other individuals.”³¹
S.D.N.Y., Judge Alison J. Nathan	Opinion & Order	<ul style="list-style-type: none"> • Judge Nathan ordered the Defendant released subject to the additional conditions of 24-hour home incarceration and electronic location monitoring as directed by the Probation Department based in part on “the unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic” which may place inmates “at a heightened risk of contracting COVID-19 should an outbreak develop [in a prison].”³²

Federal Immigration Detention	9th Cir., Judges Wardlaw, M. Smith, and Judge Siler, 6 th Cir., sitting by designation.	Sua Sponte Order	<ul style="list-style-type: none"> The panel held “[i]n light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers, the court <i>sua sponte</i> orders that Petitioner be immediately released from detention and that removal of Petitioner be stayed pending final disposition by this court.”³³
	C.D. Cal, Judge Terry J. Hatter, Jr.	TRO and order to show cause based on writ of habeas corpus	<ul style="list-style-type: none"> Judge Hatter ordered the release of two ICE detainees. The court found that in detention “[p]etitioners have not been protected [against risks associated with COVID-19]. They are not kept at least 6 feet apart from others at all times. They have been put into a situation where they are forced to touch surfaces touched by other detainees, such as with common sinks, toilets and showers. Moreover, the Government cannot deny the fact that the risk of infection in immigration detention facilities – and jails – is particularly high if an asymptomatic guard, or other employee, enters a facility. While social visits have been discontinued at Adelanto, the rotation of guards and other staff continues.”³⁴
	D. Mass, Judge Mark L. Wolf	Oral Order	<ul style="list-style-type: none"> Judge Wolf ordered the release, with conditions, from ICE custody a member of the class in <i>Calderon v. Nielsen</i> based, in part, on the “extraordinary circumstances” posed by COVID-19.³⁵
	D. Mich, Judge Levy	Opinion and Order	<ul style="list-style-type: none"> the Court granted Petitioner’s application for a temporary restraining order requiring her immediate release from detention for the duration of the COVID-19 State of Emergency in Michigan or until further Court order.³⁶
	S.D.N.Y., Judge George B. Daniels	Memorandum Decision and Order	<ul style="list-style-type: none"> Judge Daniels ordered the release, under <i>Mapp v. Reno</i>, 241 F.3d 221 (2d Cir. 2001), of an individual as there was likelihood of success on the merits and COVID-19 risks and individual’s own medical issues constituted “extraordinary circumstances warranting release.”³⁷
	S.D.N.Y., Judge Alison J. Nathan	Opinion and Order	<ul style="list-style-type: none"> Judge Nathan ordered the immediate release of four detainees finding “no evidence that the government took any specific action to prevent the spread of COVID-19 to high-risk individuals . . . held in civil detention.”³⁸

S.D.N.Y., Judge Analisa Torres	Memorandum Decision and Order	<ul style="list-style-type: none"> Judge Torres granted immediate release on recognizance for ten individuals in immigration detention who have a variety of chronic health conditions that put them at high risk for COVID-19. These conditions include obesity, asthma, diabetes, pulmonary disease, history of congestive heart failure, respiratory problems, gastrointestinal problems, and colorectal bleeding. The court held detainees face serious risks to their health in confinement and “if they remain in immigration detention constitutes irreparable harm warranting a TRO.”³⁹
S.D.N.Y., Judge Alvin K. Hellerstein	Order	<ul style="list-style-type: none"> The court granted the plaintiffs' motion for preliminary injunction. The order enjoined ICE's New York Field Office Director from following the No-Release Policy and to return to its pre-June 2017 practice of making individualized assessments about whether detention is justified by flight risk or danger.⁴⁰
M.D.Pa., Judge John E. Jones III	Memorandum and Order	<ul style="list-style-type: none"> Judge Jones granted the temporary restraining order and the Respondents were directed to immediately release Petitioners on their own recognizance.⁴¹

¹ This chart provides only a sample of the judicial action taken throughout the country as judges continue to respond to the COVID-19 pandemic.

² Administrative Order, No. 2020-00010, Ala. Ct. App. (Mar. 18, 2020), <https://drive.google.com/file/d/1I4QLwsvfSVkdOuo5p6qb1JcuFWcAV4oA/view?usp=sharing>. Note: the original order has been revised to provide discretion to the Sheriffs. See Mike Carson, *Alabama Judge Orders Jail Inmates Released, then Leaves it Up to Sheriffs*, AL.Com (Mar. 19, 2020), <https://www.al.com/news/2020/03/alabama-judge-orders-jail-inmates-released-then-leaves-it-up-to-sheriffs.html>.

³ Scott Buffon, *Coconino County Jail Releases Nonviolent Inmates in Light of Coronavirus Concerns*, Arizona Daily Sun (updated Mar. 25, 2020), https://azdailysun.com/news/local/coconino-county-jail-releases-nonviolent-inmates-in-light-of-coronavirus/article_a6046904-18ff-532a-9dba-54a58862c50b.html.

⁴ Advisory from California Chief Justice Tani Cantil-Sakauye to Presiding Judges and Court Executive Officers of the California Courts (Mar. 20, 2020), <https://newsroom.courts.ca.gov/news/california-chief-justice-issues-second-advisory-on-emergency-relief-measures>.

⁵ *Standing Order of the Sacramento Superior Court*, No. SSC-20-PA5 (Mar. 17, 2020), <https://www.saccourt.ca.gov/general/standing-orders/docs/ssc-20-5.pdf>.

⁶ Order of Consolidation and for Appointment of Special Master, SCPW-20-0000200, SCPW-20-0000213 at 6 (Haw. Apr. 1, 2020) https://www.courts.state.hi.us/wp-content/uploads/2020/04/040220_SCPW20-200and20-213_OPDvConnors_OPDvIge_ORD.pdf

⁷ Kyle C. Barry, *Some Supreme Courts Are Helping Shrink Jails to Stop Outbreaks. Others Are Lagging Behind*, The Appeal (Mar. 25, 2020), <https://theappeal.org/politicalreport/some-supreme-courts-are-helping-shrink-jails-coronavirus>; John Cheves, *Chief Justice Pleads for Kentucky Inmate Release Ahead of COVID-19 but Progress Slow*, Lexington Herald Leader (Mar. 23, 2020), <https://www.kentucky.com/news/coronavirus/article241428266.html>.

- ⁸ Emergency Order Vacating Warrants for Unpaid Fines, Unpaid Restitution, Unpaid Court-Appointed Counsel Fees, and Other Criminal Fees (Mar. 17, 2020), <https://www.courts.maine.gov/covid19/emergency-order-vacating-warrants-fines-fees.pdf>.
- ⁹ Op. and Order, *Committee for Public Counsel Services v. Chief Justice of the Trial Court*, SJC 12926 (Mass. Apr. 3, 2020) <https://www.mass.gov/files/documents/2020/04/03/12926.pdf>
- ¹⁰ Joint Statement of Chief Justice Bridget M. McCormack, Mich. Sup. Ct. and Sheriff Matt Saxton, Exec. Dir., Mich. Sheriff Ass'n (Mar. 26, 2020), [https://courts.michigan.gov/News-Events/press_releases/Documents/CJ%20and%20MSA%20Joint%20Statement%20draft%20\(003\).pdf](https://courts.michigan.gov/News-Events/press_releases/Documents/CJ%20and%20MSA%20Joint%20Statement%20draft%20(003).pdf).
- ¹¹ Letter from Chief Justice Mike McGrath, Mont. Sup. Ct. to Mont. Ct. of Ltd. Jurisdiction Judges (Mar. 20, 2020), <https://courts.mt.gov/Portals/189/virus/Ltr%20to%20COLJ%20Judges%20re%20COVID-19%20032020.pdf?ver=2020-03-20-115517-333>.
- ¹² Consent Order, *In the Matter of the Request to Commute or Suspend County Jail Sentences*, No. 084230 (N.J. Mar. 22, 2020), https://www.aclu-nj.org/files/5415/8496/4744/2020.03.22_-_Consent_Order_Filed_Stamped_Copy-1.pdf; see also Am. Consent Order, *In the Matter of the Request to Commute or Suspend County Jail Sentences*, No. 084230 (N.J. Mar. 23, 2020) <https://njcourts.gov/notices/2020/n200323b.pdf?c=3hl>
- ¹³ *People of the State of New York, ex rel., v. Cynthia Brann*, No. 260154/2020 (Sup. Ct. NY Mar. 25, 2020), https://linkproctect.cudasvc.com/url?a=https%3a%2f%2flegalaidnyc.org%2fwp-content%2fuploads%2f03%2fLAS-Mass-Parole-Holds-Writ.pdf&c=E.L.pDbcoVtCj0c6j6E8cI3m276vaRsx-nztitikQuvDwS91mRHj6RhL8o5pEJmJl-lk86sC7-flrq9dTlh2Pe3ZmAUcoZiC9er2g4Z4mL_ToQ.&typo=l; see also Frank G. Runyeon, *NY Judges Release 122 Inmates as Virus Cases Spike in Jails*, Law360 (March 27, 2020), <https://www.law360.com/newyork/articles/1257871/ny-judges-release-122-inmates-as-virus-cases-spike-in-jails>.
- ¹⁴ *Jeffrey v. Bran*, (Sup. Ct. NY Mar. 26, 2020). See Press Release, Redmon Haskins, *Legal Aid Wins Release of 16 Incarcerated New Yorkers at a High Risk of COVID-19 from City Jails* (Mar. 26, 2020), <https://legalaidnyc.org/wp-content/uploads/2020/03/03-26-20-Legal-Aid-Wins-Release-of-16-Incarcerated-New-Yorkers-at-a-high-risk-of-COVID-19-from-City-jails.pdf>; see also Runyeon, *NY Judges Release 122 Inmates*, *supra* note 13.
- ¹⁵ Press Conference, Ohio Chief Justice Maureen O'Connor and Gov. Mike DeWine (Mar. 19, 2020) at 2, <http://www.courtnewsohio.gov/bench/2020/CJRemarks031920.pdf>; see also WLWT5, *Release Ohio Jail Inmates Vulnerable to Coronavirus*, *Chief Justice Urges* (Mar. 19, 2020), <https://www.wlwt.com/article/release-ohio-jail-inmates-vulnerable-to-coronavirus-chief-justice-urges/31788560#>.
- ¹⁶ Mem. from Chief Justice Beatty, Sup. Ct of S.C to Magistrates, Mun. Judges, and Summary Ct. Staff (March 16, 2020), <https://www.sccourts.org/whatsnew/displayWhatsNew.cfm?indexId=2461>.
- ¹⁷ Emergency Pet. to Supplement Court's Order With Directives Necessary to Reduce COVID-19 Public Health Risks Associated with Tennessee Jails, Juvenile Detention Centers and Prisons, *In re COVID-19 Pandemic*, No. ADM2020-0428 at 2, (Tenn. Mar. 25, 2020), available at <https://clearinghouse.net/detail.php?id=17455&search=source%7Cgeneral%3BspecialCollection%7C62%3Bborderby%7CfilingYear%3B> (see the Emergency Pet. under the documents heading).
- ¹⁸ Ryan Autullo, *Travis County Judges Releasing Inmates to Limit Coronavirus Spread*, Statesman (Mar. 16, 2020), <https://www.statesman.com/news/20200316/travis-county-judges-releasing-inmates-to-limit-coronavirus-spread?fbclid=IwAR3lVkaaww3bwSLSO9jXBxXNRuaWd1DRsCBFc-ZkPNIINWw8xnxzLPvZYNO4>.
- ¹⁹ Order, *Administrative Order for Court Operations During Pandemic* (Utah Mar. 21, 2020), <https://www.utcourts.gov/alerts/docs/20200320%20-%20Pandemic%20Administrative%20Order.pdf>.
- ²⁰ Am. Order, *In the Matter of Statewide Response by Washington State Courts to the Covid-19 Public Health Emergency*, No. 25700-B-607 (Wash. Mar. 20, 2020), <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/Supreme%20Court%20Emergency%20Order%20re%20CV19%20031820.pdf>.
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- ²² Minute Order, *United States v. Michaels*, 8:16-cr-76-JVS, (C.D. Cal. Mar. 26, 2020),

https://drive.google.com/file/d/1BeWih63M7FKreKEvLjYIQevYSivGA_PU/view.

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- ²⁴ Minute Order, *United States v. Jaffee*, No. 19-cr-88 (RDM) (D.D.C. Mar. 26, 2020), <https://drive.google.com/file/d/1AYfU6QKCOElpX5Vh3A6BDqO8goZ5WE/view>.
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- ³⁴ TRO and Order to Show Cause, *Castillo v. Barr*, No. 20-cv-605 (TJH)(AFM), at 10 (C.D. Cal. Mar. 27, 2020), <https://drive.google.com/file/d/1BefuU-Lrj-VVeA6QA2O7zLud7aWlVn/view>; See also, Order, *Rodriguez v. Wolf*, 5:20-cv-00627-TJH (GJSx), at 2 (C.D. Cal. April 2, 2020), available at <https://clearinghouse.net/detail.php?id=17463&search=source%7Cgeneral%3BspecialCollection%7C62%3Borderby%7CfilingYear%3B> (see the Order under the documents heading) (Judge Hatter granting the plaintiffs' motion for a temporary restraining order and ordered the release of the six detainees).
- ³⁵ Tr. of Oral Argument, at 3-4, 6, *Jimenez v. Wolf*, No. 18-10225-MLW (D. Mass. Mar. 26, 2020), <https://www.courtlistener.com/recap/gov.uscourts.mad.195705/gov.uscourts.mad.195705.507.1.pdf>.
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³⁹ Mem. and Order, *Basank v. Decker*, No. 20-cv-2518 (AT), at 7, 10 (S.D.N.Y. Mar. 26, 2020), https://drive.google.com/file/d/1FJ7tU9JCskKPh4xkoe4j3YgoQ5y2_y0P/view.

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Public Health Declaration to Protect Incarcerated Persons, Correctional Staff, and Wisconsin Communities from COVID-19

Amanda M. Simanek, MPH, PhD
Associate Professor of Epidemiology
Joseph J. Zilber School of Public Health
University of Wisconsin-Milwaukee

Lorraine Halinka Malcoe, MPH, PhD
Associate Professor of Epidemiology
Joseph J. Zilber School of Public Health
University of Wisconsin-Milwaukee

We declare as follows:

1. Amanda M. Simanek, MPH, PhD, is an Associate Professor of Epidemiology in the Joseph J. Zilber School of Public Health at University of Wisconsin-Milwaukee, where she regularly teaches courses in principles of epidemiology, social epidemiology and epidemiologic links between infectious disease and chronic disease. She is a member of the American Public Health Association and member of, as well as a designated COVID-19 expert, for the Interdisciplinary Association of Population Health Sciences. Dr. Simanek has been active in infectious disease epidemiology research since she was a graduate student in the University of Michigan School of Public Health where she completed a Master of Public Health in International Health Epidemiology and PhD in Epidemiologic Science. Her research focuses on understanding social patterning of disease, etiologic links between infectious and chronic diseases such as cardiovascular disease and depression, and novel immunologic pathways by which social conditions contribute to the development of chronic diseases across the lifecourse and across generations. She is currently funded by the National Institute for Minority Health and Health Disparities to study the association between maternal socioeconomic disadvantage, adverse birth outcomes and inflammatory response in children at birth. Dr. Simanek was also previously part of a research team that carried out a Centers for Disease Control-funded study of voluntary isolation on transmission of influenza and other respiratory illnesses among university students. She has been volunteering as an outside expert for the Wisconsin Army National Guard team planning response for the coronavirus pandemic since March 19th, 2020.
2. Lorraine Halinka Malcoe, MPH, PhD is an Associate Professor of Epidemiology and Undergraduate Program Director in the Joseph J. Zilber School of Public Health at University of Wisconsin-Milwaukee. She earned her PhD in Epidemiology and her MPH in Epidemiology and Biostatistics from the University of California at Berkeley. Her primary areas of expertise are in social epidemiology, community health, health disparities, and educational interventions. Dr. Malcoe has nearly 30 years of experience teaching epidemiologic methods and designing and directing federally-funded (e.g., NIDA, NIJ, NIEHS, CDC, CIHR [Canada]) observational and community-level intervention research impacting incarcerated, low

income, rural, urban, immigrant, African American, Native American, and Hispanic populations. Dr. Malcoe has collaborated with state-level departments of corrections, correctional institutions, community organizations, and tribal governments. Her research has informed local and national policy regarding effective re-entry strategies (New Mexico), widespread environmental exposures (the Tar Creek Superfund site in Oklahoma), and violence against American Indian women (reauthorization of the Violence Against Women's Act).

3. The SARS-nCoV-2 virus and the disease it causes (i.e., COVID-19) has become a global pandemic. The United States is now the epicenter of the outbreak with over 455,000 cases and 16,390 deaths reported to date.
4. COVID-19 is characterized by a flu-like illness (i.e., fever, cough, shortness of breath). While the majority of cases are self-limited and generally mild, many cases have more severe disease requiring medical intervention and support such as supplemental oxygen and positive pressure ventilation. Indeed, over the past six weeks, 20.7-31.4% of cases have been hospitalized and 4.9-11.5% have been admitted to intensive care units overall, with rates even higher among those aged 65 years and older. (1) During this same time frame, the overall case fatality rate of COVID-19 has been estimated to range from 1.8-3.4%, which is 2 to 35 times the rate of death associated with seasonal influenza infection. (1)
5. In the United States, severe complications due to COVID-19 that require intensive care unit (ICU) admission or other hospital admission are more common among the elderly and among people with one or more underlying health conditions.(2,3) These conditions most commonly include diabetes mellitus, chronic lung disease, obesity, and cardiovascular disease, or other recognized risk factors (e.g., smoking) for severe outcomes from respiratory infections.(2,3) Among laboratory-confirmed cases, those with an underlying condition had four times the rate of hospitalization without ICU admission than those with no underlying condition (27.3–29.8% vs 7.2–7.8%, respectively). Likewise, cases with an underlying condition had nearly six times the rate of ICU admission than those with no underlying condition (13.3–14.5% vs 2.2–2.4%, respectively). (2) Among cases 65 years and older with one or more underlying health conditions or risk factors, the rates of hospitalization without ICU (41.7–44.5%) and ICU admissions (20.8–22.2%) are much higher. (2)
6. The first case of COVID-19 was detected in Wisconsin on February 5th, and as of April 9th, 2020 there have been 2,885 cases diagnosed, of which 29.2% have been hospitalized and 111 have died, with sustained community spread of the virus in numerous Wisconsin counties. (4) Mirroring national data, the hospitalization rate in Wisconsin increases with age: 19% for cases in their 40s, 27% for cases in their 50s; 38% for cases in their 60s; 53% for cases in their 70s; and 67% for cases in their 80s. There are also stark racial disparities with 44% of deaths due to COVID-19 occurring among African Americans. (4)
7. On March 12th, 2020, Governor Evers declared a public health emergency in the State of Wisconsin. As of March 18th, 2020, all schools in Wisconsin were closed and over the next two weeks, the Governor continued to implement other social distancing measures to limit the spread of COVID-19, such as increasingly tighter restrictions on the size of public and private gatherings, closure of restaurants and bars, and the eventual issue of a "Safer at Home" order on March 24th, 2020. This "Safer at Home" order applies to the entire state and mandates that all Wisconsinites stay at home as much as possible and that non-essential businesses cease operations, with limited exceptions for minimum basic operations and working from home. All

public and private gatherings of any number of people that are not part of a single household or living unit are prohibited, with limited exceptions. (5)

8. Under the “Safer at Home” order, social distancing requirements include: 1. Maintaining social distancing of six feet between people; 2. Washing hands with soap and water for at least 20 seconds as frequently as possible or using hand sanitizer; 3. Covering coughs or sneezes (into the sleeve or elbow, not hands); 4. Regularly cleaning high-touch surfaces; 5. Not shaking hands; and 6. Following all other public health recommendations issued by the Wisconsin Department of Health Services and the Centers for Disease Control and Prevention (CDC). (5) The CDC also now recommends that individuals who leave home to obtain essential services, groceries, medications, etc., wear a cloth mask while out in public to further help prevent the spread of SARS-nCoV-2 infection. (6)
9. A primary reason for the safer-at-home order is that likely all of our state’s 2,600 ICU beds and 620 ventilators (7) will be operating at or beyond full capacity for long periods, even with these social distancing measures in effect. Moreover, 34 out of Wisconsin’s 72 counties have no ICU beds. (8) Even with efforts to increase capacity, *it is essential during this time when our healthcare system is saturated, that every effort be made to reduce outbreaks that would only further stress our ability to care for both COVID-19 patients and all other patients who need hospital care, including in rural counties with limited health care services.*
10. SARS-nCoV-2 infections are transmitted through inhalation of aerosolized droplets expelled when individuals cough or sneeze, or when individuals touch surfaces that may become contaminated when droplets land on them after someone coughs or sneezes. Individuals who are infected with SARS-nCoV-2 can take between 2-14 days to develop symptoms (9-11) yet they are still infectious up to 48 hours before showing any symptoms (11), while ***as many as 25% or more of infected individuals never become symptomatic yet still can transmit the infection to others.*** (12, 13-16) *Given this high asymptomatic rate, effective screening of prison staff who move in and out of facilities on a daily basis is not possible without frequent and rapid testing.* For these reasons, combined with the inability at present to conduct widespread testing, the combination of social distancing, hand hygiene, and proper sanitizing of frequently touched surfaces is a key mitigation strategy for this infection.
11. COVID-19 is highly contagious. We have repeatedly seen logarithmic increases in cases and deaths throughout U.S. localities since the start of the pandemic, and we are beginning to see the same pattern in prisons and jails. ***It only takes one person, for example a single asymptomatic correctional officer, to infect an entire facility*** (including incarcerated people and staff). At the Cook County jail in Illinois, the first two COVID-19 cases were identified on March 23rd. By April 1st, just nine days later, the number of confirmed cases had risen to 167. That number rose to 220 just four days later, including 14 who have been hospitalized and one who died awaiting his court date. As of April 9th there have been confirmed diagnoses of COVID-19 among 283 people incarcerated in federal prisons, *including 8 who have died*, and 125 Bureau of Prison staff. (17) The infection rate in New York jails demonstrates what can and will occur in our State prisons if action is not taken now to allow effective social distancing – in New York the infection rate has been estimated at nearly 4%, 8 times higher than the already-high New York City rate and over 9 times higher than the hardest-hit region in Italy. In Illinois state prisons, as of April 9th, 86 Department of Corrections staff have tested positive for SARS-nCoV-2 across 11 prisons, along with at least 134 persons incarcerated at seven prisons (with

187 lab tests still pending) – of note, there is a major outbreak at Stateville Correctional Center, with at least 118 confirmed cases and two incarcerated individuals who have died from COVID-19. (18)

12. Without swift action to reduce the state prison population to allow effective social distancing, it is virtually inevitable that severe outbreaks of COVID-19 will occur throughout the State of Wisconsin prison system ***culminating in a public health disaster including many unnecessary deaths of people under the care of the Wisconsin Department of Corrections (WDOC)***. As of April 9th, 2020, **12** WDOC workers, including some medical staff, have tested positive for SARS-nCoV-2 across four facilities: the Milwaukee Secure Detention Facility (n=5), Division of Community Corrections - Milwaukee Office (n=3), Columbia Correctional Institution (n=3), and Waupun Correctional Institution (n=1). In addition, 5 cases have been diagnosed in the last week among incarcerated persons in the State: 2 at the Columbia Correctional Institution, 2 at the Oshkosh Correctional Institution, and 1 detainee in the Waukesha County Jail. (19) ***We must immediately reduce prison populations throughout Wisconsin, starting in Milwaukee where the community-wide outbreak is the most advanced – timely release is paramount.***
13. Despite concerted efforts to prevent outbreaks of COVID-19 throughout the WDOC, prisons throughout Wisconsin are ripe for amplifying the spread of COVID-19 for several reasons: 1) correctional officers and other staff can easily be exposed in the community (especially those with community spread) and then transmit the virus to incarcerated persons and other staff in their workplace; 2) there is no adequate protocol for screening of asymptomatic infection in uniformed staff; 3) high population density in close confinement inhibits maintaining a 6 ft distance from others and thus social distancing is not possible to the same degree as in the general public, and 4) institutional conditions and rules common in prisons exacerbate risk - these include limited medical care infrastructure and personal protective equipment as well as delays in medical evaluation and treatment; rationed access to soap, water, and clean laundry; contraband policies that forbid the use of alcohol-based hand sanitizers and masks; inadequate ventilation; and shared toileting, showering, and eating environments. (20-23) Moreover, some WDOC correctional facilities are severely overcrowded, including the Milwaukee Secure Detention Facility and the Robert Ellsworth, both of which have been operating at over 200% capacity, and the Prairie Du Chien where in some cases there are eight people housed per cell. In sum, these conditions within Wisconsin prisons prevent implementation of the CDC's guidance on management of COVID-19 disease in correctional and detention facilities, including social distancing to prevent overcrowding during a community outbreak, separate quarantining of all new intakes for 14 days, and medical isolation. (24)
14. Space limitations within correctional institutions also pose a challenge for following Wisconsin Department of Health Services recommendations for quarantine of those with contact to a COVID-19 case (recommended duration 14 days since exposure) as well as isolation (note that this does not equate to solitary confinement, which is well known to cause psychological harm and thus could worsen recovery) of COVID-19 cases (recommended until 72 hours have passed with no fever and without the aid of fever reducing medication, and other symptoms have improved *and* at least seven days have passed since symptoms first appeared). (25)
15. Incarcerated persons in jails and prisons are not only at increased risk of COVID-19 because of the nature of the prison environment, they also have increased risk of adverse complications resulting from COVID-19 due to a higher prevalence (43.9% vs 31.0% in the general population)

of underlying chronic conditions, including high blood pressure/hypertension (30.2%), tuberculosis (6%), asthma (14.9%), diabetes (9%), cardiovascular disease (11.6%), renal disease (6.1%), hepatitis B or C (10.9%), and HIV/AIDS (1.3%). (25) As well over 19% of the WDOC prison population is 50 years or older (24), further compounding their increased risk of hospitalization and ICU admission once infected. Governor Evers pledged during his campaign for office to close the Milwaukee Secure Detention Facility (MSDF), where re-incarceration for crimeless revocations is common, and to institute reforms that would reduce Wisconsin's incarcerated population by half. The need for the Evers administration and the Courts to act on these promises is now urgent. From a public health perspective, **safe and rapid decarceration is among the most effective preventative measures that can be taken to reduce the spread of COVID-19 within jails and prisons** and reduce hospitalizations and deaths from jail- and prison-acquired COVID-19 infections. Decarceration reduces population density and allows for increased social distancing.

16. Revocations account for 40% of new admissions to Wisconsin's state prisons. Directly impacted persons and other advocates have long identified Wisconsin's supervision and revocation processes as a tool for cycling Wisconsin residents in and out of jails and prisons. MSDF was erected in 2001 to imprison people on parole/probation violations. Its mission was further expanded to detaining persons in alternatives to revocation programs, persons with "temporary lock-up" status, and incarcerated persons slated to be released within one year. Operating capacities at this facility, designed to detain under 500 people, have averaged over 1,000. Lack of access to direct sunlight, air conditioning, and outdoor recreation, 20-23 hour lockdowns and extreme heat further exacerbate MSDF's conditions of overcrowding, which force incarcerated persons into triple-bunked cells, making the risk of a COVID-19 outbreak practically imminent. Communicable disease and chronic health conditions have plagued MSDF since its opening. A total of 17 people have died while confined in MSDF, a statistic made even more alarming in the context of the COVID-19 pandemic. As stated, there are already three confirmed cases among MSDF staff. **MSDF in particular must be depopulated well below the 500 capacity for which it was designed assuming no COVID-19 pandemic.**
17. The release of detainees, especially those with increased health-related vulnerability, also protects health care surge capacity by reducing the number of people who will become ill enough to require hospitalization, which in turn reduces the health and economic burden to the local community at large.
18. There are also compelling ethical and legal obligations to reduce populations of correctional institutions. Incarcerated persons have inalienable human rights conferred upon them by international treaties and covenants, including a right to adequate health care. They also have a right not to contract disease while incarcerated, particularly an infectious disease that is potentially lethal. For correctional staff, the 1970 Occupational Safety and Health Act gives workers the right to refuse to work under unsafe working conditions without reprisal.
19. To reiterate, social distancing is our primary available means to effectively control the spread of COVID-19 in correctional institutions, barring extensive testing and contact tracing, followed by isolation or quarantine. Yet, social distancing is not possible with the current number of persons in custody in jails and prisons throughout Wisconsin. Release of detainees who present a low risk of harm to the community is thus an essential public health prevention strategy allowing for increased adherence to social distancing recommendations.

20. As of April 2nd, 2020, the WDOC has committed to “releasing supervision holds on 1,148 non-violent misdemeanants throughout the state, releasing others persons in custody that qualified for Certain Earned Release,” and they identified and released “65 individuals participating in an Alternative for Revocation (ATR) at the Milwaukee Secure Detention Facility (MSDF).” (19) Of note, as of December 31st, 2018, 55% of the WDOC incarcerated population had two or fewer years left to serve.
21. Several additional populations must be prioritized for safe and rapid reduction of prison populations via compassionate release, mass clemency, medical or emergency furloughs, or other commutations of sentences: 1) persons held for non-payment of fees and fines, because of insufficient funds to pay bail, or who otherwise have not been convicted of a crime; 2) detainees in MSDF who were re-incarcerated for technical rule violations or other reasons without commission of a new crime (i.e., crimeless revocations); 3) detainees convicted of low-level offenses and those nearing release with re-entry plans or on less than 12 month deferrals; 4) parole-eligible detainees; 5) pregnant women; 6) detainees with chronic conditions or risk factors predisposing to severe COVID-19 disease (heart disease, obesity, lung disease, diabetes, renal disease, immune-compromised, heavy smokers); and 7) older detainees (50 years and older). Additionally, new incarcerations and use of pre-trial detention should be limited to the extent possible and used only in those cases where there are genuine security concerns.
22. When detainees are released, it is important to ensure that each person has family or friends who can take them in safely without jeopardizing their health. For those who do not, the WDOC and other state agencies can and should use emergency money from the federal government to help secure safe housing for them. If detainees have potentially had contact with a confirmed case in correctional staff or another detainee, they should be housed in a hotel or other similar housing for 14 days to facilitate compliance with recommended quarantine before being returned to their family’s or friend’s home.
23. In sum, as epidemiologists and public health professionals, *we urge actions to safely and rapidly reduce Wisconsin’s prison populations in order to minimize the risk of severe outbreaks of COVID-19 – and especially hospitalizations and deaths – among incarcerated persons as well as correctional staff. The time for action is now.*

Pursuant to 28 U.S.C. 1746, we declare under penalty of perjury that the foregoing is true and correct. Our views represent our best professional and scientific judgments – we are not speaking on behalf of the University of Wisconsin–Milwaukee. Executed this 9th day, April, 2020.



Amanda M. Simanek, MPH, PhD
Associate Professor of Epidemiology



Lorraine Halinka Malcoe, MPH, PhD
Associate Professor of Epidemiology

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Declaration Of Geoffrey Robert Swain, MD, MPH

1. I recently retired after serving 26 years as Medical Director for the City of Milwaukee Health Department, and after a 29-year career as a medical school faculty member here in Wisconsin. I remain very active with the Wisconsin Public Health Association, and have kept closely up-to-date regarding the current COVID-19 emergency. The first 6 pages of my 44-page curriculum vitae, as of the point just prior to my retirement in January 2020, is Attachment A, and summarizes my qualifications.
2. People who are incarcerated are at extremely high risk of contracting and spreading contagious respiratory infections – including COVID-19 – for reasons similar to why nursing homes and cruise ships are also hotspots for these types of infections, and because it is not possible in these settings to practice the consistent level of physical distancing required to stop or slow the spread of COVID-19.
3. It only takes one person to put an entire facility (including both incarcerated people and staff) at risk from this dangerous and highly infectious virus. In addition, despite a current ban on visitors, there is still a significant turnover of essential people coming and going in and out of jails and prisons, as well as people being transferred between different correctional facilities.
4. For example, staff have to go home at the end of their shift and come back to work the next day. Deliveries of food and other supplies have to continue. And these staff and other individuals live in communities where community spread of COVID-19 is occurring. So, some will unwittingly serve as vectors of the disease *into* correctional facilities, and others will contract the disease in their workplace and *take it back* to their loved ones and their communities.
5. Because there are already cases in Wisconsin jails and prisons, there is no time to waste. Rikers Island in New York currently has an infection rate many-fold higher than the already-very-high general New York City rate. Wisconsin may only be 1-3 weeks behind New York in this epidemic curve, so time is of the essence.
6. I oversaw the development of the map, included as Attachment B, which illustrates that many of Wisconsin's prisons are located in or near areas where there are relatively few hospital beds in comparison to the local population. An outbreak in these areas is even more likely to quickly overwhelm local hospital systems.
7. What many people may perhaps not have considered fully yet is that this is not just about the health (or the life and death) of inmates, and not even only about the health and life and death of staff and their families. The decisions we make now will make a significant difference in the lives of every Wisconsinite who needs hospitalization for any reason during the coming months.
8. This is because the drastic social-distancing measures we are all undertaking are designed to lower the infection rate as much as practically possible (ideally to no more than about 20% of the general population over four months, or even lower if that can be achieved).

9. But even with that, Wisconsin's hospital beds (both regular beds and ICU beds) will likely be operating at or near full capacity for many weeks. Even with added bed capacity in certain areas, staff capacity remains limited, including doctors, nurses, respiratory therapists, and others. And existing staff do not have nearly sufficient personal protective equipment (PPE). With a saturated healthcare system, every effort to reduce additional infection becomes even more essential to *all* patients needing any hospital care.
10. Once the virus makes its way into a jail or prison, it will be impossible to keep infection rates anywhere near 20% over 4 months in that population (including staff and their families). With no action, a conservative estimate would be that the peak in these settings will likely be at or above 60% infections over 4 months. Other estimates are higher.
11. Since Wisconsin has about 24,000 incarcerated persons, 12,000 persons held in local jails, and about 7,650 correctional employees, and since those employees typically have at least one other adult household member, a rapid influx of COVID-19 patients from infected inmates, staff, and families of staff, will add further stress to an already strained healthcare system.
12. The availability of hospital and ICU beds, and the professionals required to staff them, is essential not only for critical cases of COVID-19 – which will include incarcerated people, prison guards, and their family members – but also for “regular people” who have heart attacks, strokes, farm accidents, and the like.
13. These “regular people” are also at risk if they are not able to get the kind of care they would normally get because their doctors, nurses, and hospitals are dealing with too many cases of COVID-19, including cases that could have been prevented through interventions in jails and prisons.
14. In addition, the doctors, nurses, and others – that all of us rely on when we are acutely ill and need hospitalization – should not be asked to deal with cases of COVID-19 that could have been prevented through interventions in jails and prisons.
15. What I know, as a long-serving and highly experienced public health professional, is that until a vaccine against COVID-19 is widely available (which is likely to be a year or more from now), physical distancing will remain the most important preventive measure we can take.
16. In the context of Wisconsin's jails and prisons, this means, most importantly, minimizing the number of detainees in each facility – to the extent that this can be done consistent with preserving public safety – in order to maximize the ability to consistently comply with social distancing recommendations in those facilities.
17. In short, every incarcerated individual in Wisconsin who can be safely moved out of jail or prison (even if under ongoing DOC supervision in the community) should be moved into the community as soon as possible – not only to reduce their risk of getting COVID-19, but also to protect guards, other staff, and the rest of us in Wisconsin communities.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 9, 2020

A handwritten signature in black ink, appearing to read 'G. Swain', with a horizontal line extending to the right and a small flourish at the end.

Geoffrey Robert Swain, MD, MPH

Attachment A

Curriculum Vitae

GEOFFREY ROBERT SWAIN, MD, MPH

*Professor (CHS) of Family Medicine and Community Health,
University of Wisconsin School of Medicine and Public Health*

Center Scientist, Center for Urban Population Health

1 January 2020

Office Address: Center for Urban Population Health
1020 N. 12th Street, Suite 4180
Milwaukee, WI 53233

Birth / Citizenship: April 3, 1960; Milwaukee, WI; Citizenship: USA

Education / Degrees: May 1982 B.S., *University of Wisconsin - Milwaukee*
May 1985 M.D., *Medical College of Wisconsin (MCW)*
May 2003 M.P.H. in Health Services Administration, *MCW*

Postgraduate Training:

- 9/94 - 5/97 Advanced Fellowship in Administration, *Dept. of Family and Community Medicine, Medical College of Wisconsin*
- 9/92 - 5/94 Faculty Development Fellowship, *Dept. of Family and Community Medicine, Medical College of Wisconsin*
- 9/91 - 1/94 Duke National Faculty Development Series, *Dept. of Community and Family Medicine, Duke University Medical Center, Durham, North Carolina (dates: 9/91, 10/91, 12/91, 2/92, 4/92, and 1/94)*
- 10/92 - 2/94 Physicians in Management, 3 week National Seminar Series, *American College of Physician Executives (dates: 10/92, 2/93, and 2/94)*
- 7/86 - 6/88 Resident, Family Practice, *Medical College of WI, St. Mary's Hospital, Milwaukee, WI*
- 7/85 - 6/86 Intern (Transitional), *St. Joseph's Hospital, Milwaukee, WI*

Administrative Appointments:

- 9/17 - 12/19 Emeritus Medical Director (and Interim Medical Director, 1/18-12/19), *City of Milwaukee Health Department*
- 1/07 - 8/17 Chief Medical Officer / Medical Director, *City of Milwaukee Health Department*
- 12/93 - 12/06 Associate Medical Director, *City of Milwaukee Health Department*

Faculty Appointments:

- 1/15 - Affiliate Faculty, Center for Community and Nonprofit Studies, UW School of Human Ecology
- 7/12 - Professor (CHS), Department of Family Medicine and Community Health; UW School of Medicine and Public Health
- 3/10 - Adjunct Faculty, UW-Milwaukee Zilber School of Public Health
- 1/06 - Affiliate Faculty, Department of Population Health Sciences; UW School of Medicine and Public Health
- 7/04 - Center Scientist, Center for Urban Population Health, Milwaukee, WI
- 1/08 - 1/13 Affiliate member, Graduate Faculty, University of Wisconsin La Crosse
- 2/05 - 6/12 Associate Professor (CHS), Department of Family Medicine; UW School of Medicine and Public Health
- 7/04 - 2/05 Visiting Associate Professor (CHS), Department of Family Medicine, Milwaukee Clinical Campus, University of Wisconsin Medical School
- 7/99 - 6/04 Associate Professor, Division of Community Health Programs, Dept. of Family and Community Medicine, Medical College of Wisconsin
- 9/90 - 7/99 Assistant Professor, Department of Family and Community Medicine, Medical College of Wisconsin (MCW)
- 9/90 - 12/93 Assistant Director, MCW-St. Mary's Family Practice Residency, Milwaukee, WI

Previous Practice Experience:

1/89 - 7/90 Family Health Plan
Milwaukee, WI

Specialty Certification:

7/8/88 American Board of Family Medicine
(recertified 7/14/95, 7/13/01, 7/21/08, 4/7/15)

Licensure:

1986 - Wisconsin #27821

Foreign Languages:

Basic conversational Polish language

Undergraduate Awards, Honors:

Phi Beta Kappa, Sigma Epsilon Sigma, Phi Kappa Phi

Postgraduate Awards, Honors, etc:

- 6/2017 John Steadman Community Partner Award, *EXPO (Ex-Prisoners Organizing)*
- 5/2017 Community Mentor Award, *UW SMPH TRIUMPH Program.*
- 11/2015 Milwaukee Magazine's 2015 list of "Most Influential People in Milwaukee"
- 8/2013 Honoree of Excellence (Health Professionals), *Milwaukee Community Journal*
- 6/2010 Co-winner, UW Department of Family Medicine 40th Anniversary Ice Cream Naming Contest ("Primary Care-amel")
- 5/2010 Presidential Citation ("*to recognize sustained, outstanding contribution to WPHA as an organization*"), *Wisconsin Public Health Association*
- 5/2006 *Delta Omega (Alpha Omicron chapter)*, National Honorary Public Health Society
- 3/1997 New Public Health Worker of the Year, *Wisconsin Public Health Association*
- 7/1995 Fellow, *American Academy of Family Physicians*

Professional Leadership Activities (selected):

- 8/18 - CDC Region V Public Health Training Center. Evaluation and Training Needs Assessment subcommittee.
- 1/13 - Healthiest State Network (formerly called Thrive WI: Wisconsin's Alliance for Health Equity). Founding member / ongoing advisor and contributor.
- 1/07 - Wisconsin Center for Health Equity. Founding Director (and Board President beginning 11/2017)
- 11/14 - 2/18 Big10 Academic Alliance (BTAA – formerly Committee on Inter-institutional Cooperation (CIC)) Social Determinants of Health Initiative, Wisconsin Planning Team. Also, BTAA-wide "Community Capacity Building Subcommittee" 4/16 - 10/16, and "Capacity Building / Learning Collaboratives / Graduate Fellowships" workgroup 4/17.
- 10/14 - 10/18 US Region V Collaborative Improvement and Innovation Network (CoIIN) to Reduce Infant Mortality, "Health Equity Foundational Practices Learning and Action Tool Subgroup"

Professional Leadership Activities (continued):

- 8/14 - 5/17 Milwaukee Lifecourse Initiative for Healthy Families (LIHF), Steering Committee, and Policy/Systems/Environmental Change (Social Determinants of Health) Committee
- 5/15 - 9/17 US National Collaborative Improvement and Innovation Network (CoIIN) to Reduce Infant Mortality, Social Determinants Subcommittee (end date estimated)
- 2/14 - 9/17 US Region V Collaborative Improvement and Innovation Network (CoIIN) to Reduce Infant Mortality, Social Determinants Subcommittee (end date estimated)
- 2/14 - 6/17 WI Collaborative Improvement and Innovation Network (CoIIN) to Reduce Infant Mortality, Social Determinants Subcommittee (end date estimated)
- 8/09 - 6/13 Health Equity and Social Justice Committee, *National Association of County and City Health Officials (NACCHO)*
- 1/13 - 12/13 Organizational Sponsor (through the Wisconsin Center for Health Equity) of the “Thrive WI : Wisconsin’s Alliance for Health Equity” team (Tran Inzeo P, Liners D, Weitzel J, Vaughn-Jehring K), *National Leadership Academy for the Public’s Health (NLAPH)*
- 9/10 - 7/11 Social Determinants Task Force, *Milwaukee Lifecourse Initiative for Healthy Families (LIHF)*
- 10/10 - 12/10 Implementation Planning Team, Healthiest Wisconsin 2020 (Wisconsin’s 2020 Plan to Improve the Health of the Public), *State of Wisconsin, Department of Health Services, Division of Public Health*
- 8/09 - 6/10 Expert Panelist, Overarching Focus Area Strategic Team, “Social, Economic, and Educational Factors,” Healthiest Wisconsin 2020 (Wisconsin’s 2020 Plan to Improve the Health of the Public), *State of Wisconsin, Department of Health Services, Division of Public Health*
- 3/09 - 6/10 Strategic Leadership Team, Healthiest Wisconsin 2020 (Wisconsin’s 2020 Plan to Improve the Health of the Public), *State of Wisconsin, Department of Health Services, Division of Public Health*
- 6/99 - 6/10 Wisconsin Council on Immunization Practices, *Wisconsin State Division of Public Health*
- 6/00 - 6/09 Public Health Region V Infertility Prevention Program (RVIPP) Advisory Board, *Centers for Disease Control and Prevention*; also, RVIPP Advisory Board’s Client Services Subcommittee (same dates)

Professional Leadership Activities (continued):

- 8/05 - 7/09 National Immunization Advisory Workgroup, *National Association of County & City Health Officials (NACCHO)*
- 6/03 - 9/08 Regional Physician Advisory Council, *Wisconsin Region 7 Hospital Bioterrorism and Emergency Preparedness Consortium* (and Statewide Physician Advisory Council since 7/04)
- 5/05 - 10/06 Public Health Institute Task Force / Planning Team, *Wisconsin Public Health Association*
- 11/01 - 11/05 Community Collaboration for Healthcare Quality (CCHQ) Steering Team and Preventive Health Workgroup. [CCHQ: a collaborative project of the Medical Society of Milwaukee County and local payor and provider groups]
- 2/01 - 4/02 Social and Economic Factors That Influence Health Subcommittee, Turning Point Phase II - Implementation (Wisconsin's 2010 Plan to Improve the Health of the Public), *State of Wisconsin, Department of Health and Family Services, Division of Public Health*
- 3/00 - 3/02 Turning Point Transformation Team (Wisconsin's 2010 Plan to Improve the Health of the Public), *State of Wisconsin, Department of Health and Family Services, Division of Public Health*
- 11/99 - 5/00 Health Priorities Subcommittee, Turning Point (Wisconsin's 2010 Plan to Improve the Health of the Public), *State of Wisconsin, Department of Health and Family Services, Division of Public Health*
- 9/96 - 11/00 Statewide Work Groups, *Wisconsin State Division of Health: Tuberculosis Strategic Planning Group (10/98-11/00); Statewide HIV Counseling and Test Site Work Group (9/96-11/98)*
- 11/95 - 1/96 Mid-course Review Committee, Communicable Diseases, *Wisconsin State Division of Health*
- 10/94 - 4/95 Administrative Rules Committee, Public Health Statutes - Chapter 252 (Communicable Diseases), *Wisconsin State Division of Health*

Professional Journal Activities:

Journal Manuscript Peer Reviewer

2006 - Wisconsin Medical Journal / WMJ
2002 - 2015 Perspectives on Sexual and Reproductive Health
2007 - 2009 Public Health Reports
2004 - 2009 Journal of Public Health Management and Practice
2003 - 2009 American Journal of Public Health
2002 - 2008 International Family Planning Perspectives
1999 - 2009 American Family Physician

Editorial Board

2006 - Wisconsin Medical Journal / WMJ

Professional Memberships:

Wisconsin Academy of Family Physicians
American Academy of Family Physicians
Wisconsin State Medical Society
Medical Society of Milwaukee County
Physicians for Social Responsibility
Wisconsin Public Health Association (Life Member)
American Public Health Association
American Association for Physician Leadership (formerly
American College of Physician Executives: Life Member)

Offices / Positions Held:

Wisconsin Public Health Association

1/13 - Public Affairs Committee
1/18 - 12/19 Nominating Committee (Chair starting 1/19)
1/11 - 12/12 Nominating Committee (Chair starting 1/12)
1/04 - 12/10 Bylaws Committee
5/06 - 12/10 Vice President
1/03 - 5/06 Director-at-Large

Institute for Wisconsin's Health, Inc.

10/06 - 12/07 Vice President

Wisconsin Academy of Family Physicians

7/93 - 6/96 Residency Support Committee
7/88 - 6/89 Young Physicians Committee
7/87 - 6/88 Summer Externship Committee
7/87 - 6/88 Board of Directors

Southeast Chapter, Wisconsin Academy of Family Physicians

1/98 - 12/02 Board of Directors

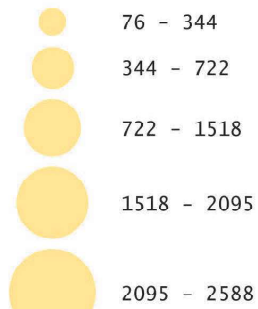
Attachment B

WI Total Prison Population (Inmates and Full Time Employees) and People per Estimated Available Hospital Bed, by County

Legend

Total Pop. (Inmates + FTEs)

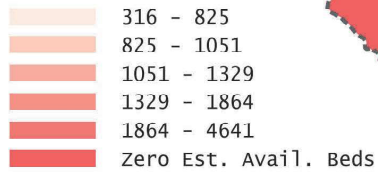
State Prisons



Federal Prison



People per Available Bed



Area totals:
 Population: 1,712,594
 Prison population: 18,092
 Available beds: 1,143
 Available ICU beds: 138

Area totals:
 Population: 2,632,957
 Prison population: 5,349
 Available beds: 1,947
 Available ICU beds: 399

Area totals:
 Population: 608,860
 Prison population: 4,174
 Available beds: 598
 Available ICU beds: 32

