



# COUNTING THE DAYS:

THE STORY OF PROLONGED DETENTION DURING COVID-19

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UCLA School of Law Bail Practicum, December 2020

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# Executive Summary

Jails in Los Angeles County have been overcrowded and dangerously unhealthy for some time and the COVID-19 pandemic has made the dangers of incarceration far worse. COVID-19 has already become a death sentence for many incarcerated around the country, and with the recent surge, the rate of illness and death will unfortunately only increase unless appropriate and swift action is taken. In the face of this pandemic, judicial and local actors have engaged in policymaking and practices that have contributed to the prolonged detention for people incarcerated pretrial.

Hundreds, if not thousands of people, considered legally innocent, find their access to the courts and counsel, two of the most important rights in our criminal legal system, cut off. People are missing court hearings and experiencing lengthy trial delays, all while being exposed for increasingly longer periods of time in the jails, considered some of the deadliest congregate living settings in the country.

This report, authored by clinical students at UCLA School of Law, highlights the actions of the courts and the Los Angeles County Sheriff's Department and the impact this has had on specifically people incarcerated pretrial (although the risk of COVID-19 is present for all people incarcerated in the jails). It uncovers the fact that during a time when the County should be working to decarcerate the jails and shorten the length of stay, that instead the County continues to funnel people into jails and keep them there for longer periods of time than pre-pandemic. In light of these counter-intuitive and dangerous policies, this report focuses on three important recommendations:

1. Reduce the jail population using appropriate release procedures and decreasing new bookings
2. Mitigate the spread of the virus in jails and prevent the overuse of quarantine practices
3. Safely resume jury trials for those who remain in custody

# I. Introduction

*I felt like I was going to die for 5 days. Couldn't breath [sic] had chills lost smell and couldn't move for 5 days.*

*-Declaration from an individual incarcerated in Men's Central Jail*

Right now, thousands of legally innocent people sit in Los Angeles County (the County) jails, facing a heightened risk of serious illness or death due to the COVID-19 pandemic. Judicial actions and the Los Angeles Sheriff's Department's (LASD) practices have combined to contribute to lengthy periods of pretrial detention that were not present prior to the pandemic. As the data analysis in this report will show, people are spending far more time in custody pretrial during the pandemic than before. Every additional day they are in custody, subjected to conditions that do not allow for basic precautionary measures against the disease, their risk of being exposed to and contracting COVID-19 grows.

Before the spread of COVID-19, jails throughout the U.S. were already dangerous and deadly places.<sup>1</sup> Between 2008 and 2019, 7,571 people died in more than 500 US jails, which amounted to 35% more deaths than the previous decade. Over two-thirds of those that died in jail, were individuals being held pretrial – those who were never convicted of any crime.<sup>2</sup> A deadly pandemic notwithstanding, jails are already dealing with catastrophic health concerns, and COVID-19 will only exacerbate these issues. Jails that were over capacity prior to the pandemic remain over capacity. The Los Angeles County jail system had a pre-pandemic population greater than 17,000 people, severely exceeding its rated capacity of 12,404 people.<sup>3</sup> Although the County was able to safely and commendably reduce the total jail population to 11,756 people in May<sup>4</sup>, the jail population has spiked again to just under 15,000.

Amidst these fluctuations in population, the COVID-19 pandemic brought the judicial system to a grinding halt. In March, orders were issued by the California Judicial Council delaying arraignments, preliminary hearings, and jury trials statewide for a limited period of time. Today, nine months after these initial orders were issued, some counties—particularly Los Angeles County—have failed to bring delayed trials to court in a meaningful way or to maintain a reduced jail population in order to mitigate the spread of COVID-19. Despite the resumption of criminal trials for a brief period of time in September, the County continues to unduly extend periods of incarceration for people who are presumed innocent, likely contributing to the increasing jail population.

Delaying trials as a result of our current public health crisis may seem like the right thing to do since jurors, witnesses, lawyers, and court employees risk transmission by appearing in court, and risk bringing the virus home to their families. But it is much easier to implement public health guidelines and maintain physical distance in a courtroom than in an overcrowded jail, and this is certainly true nine months into the pandemic, now that there are clear guidelines on how to reduce the transmission of COVID-19 indoors.

Not only have trials been delayed, but LASD repeatedly fails to take the appropriate measures to prevent people in jail from being exposed to COVID-19. This has resulted in repeated quarantines, which in turn have prevented people from accessing counsel and attending their hearings, causing even further delays to the resolution of their cases. Instead of continuing to release people from jail to await their delayed trials in safer conditions, state and county actors are implementing policies and engaging in practices that cause people in jails to be exposed to COVID-19 for longer periods of time. This is unacceptable from actors who are duty bound to care for people in their custody.

This report brings to light the official policies and practices that have contributed to prolonged incarceration during a deadly pandemic, explores the legal rights that have been and continue to be violated as a result, and provides urgent recommendations for the County to take in response to this crisis. With COVID-19 rates now increasing all over the country, the number of deaths and COVID-19 related long-term health implications are likely to increase exponentially if appropriate action is not taken to reduce the number of people in the jails and to safely and expeditiously resolve cases.

## **II. Methodology**

This report relies on numerous sources of information to make its claims. Analysis was conducted on 407 declarations from people incarcerated in the County's jails, all gathered between June and September of this year. Questionnaires were sent to people incarcerated by plaintiffs' counsel in *Cullors v. County of Los Angeles*, a lawsuit challenging the jail's policies regarding COVID-19. Each individual filled out the questionnaire under penalty of perjury and returned them to the plaintiffs' legal team in the form of a declaration. The declarations were anonymized and stripped of personal identifying information for the purposes of this report.

Declarations were collected from each of the jails: 25 from the women's facility (Century Regional Detention Facility), 209 from Men's Central Jail, 111 from North County Correctional Facility, 14 from Pitchess Detention Center and 26 from Twin Towers Correctional Facility. The age of the declarants ranges from 19-73. 43% of the declarants stated they were incarcerated post-conviction, while 55% said they were incarcerated pretrial. Of those that were incarcerated pretrial, their booking dates ranged from 2012 (an outlier) to August 2020, with 79% of people with a booking date either in 2019 or 2020.

Second, interviews were conducted of Los Angeles County Public Defenders to understand both their experience and that of their clients during the pandemic. Third, data taken directly from LASD's website on quarantine rates, test rates, as well as data gathered from its website regarding individuals incarcerated at two points in time (pre-pandemic and during). Finally, students in the UCLA School of Law Bail Practicum worked with the County Public Defender's Office to represent clients in felony bail hearings from August through December 2020. Their first-hand experiences with clients and the court system inform this report.

### III. The Devastating Impact of COVID-19 in Carceral Facilities

*I am in fear for my life every minute of every day...I have to clean areas where infected inmates were housed without proper training, PPE or basic cleaning supplies...I didn't refuse the work because I was in fear of losing my job and worktime credit.*

*--Declaration from an individual incarcerated at Pitchess Detention Center*

As of the writing of this report, over 400,000 people have been infected with COVID-19 in jails and prisons throughout the U.S. and at least 1,800 people (both incarcerated people and correctional officers) have died.<sup>5</sup> Carceral facilities are considered super-spreader locations. An early study of a jail that quickly implemented preventative COVID-19 measures found that one positive person who was incarcerated infected 8.44 other people incarcerated at that jail, an infection rate that was **4 times higher** than that in Wuhan, China, where the COVID-19 virus is believed to have originated.<sup>6</sup> As of December, North County jail in Los Angeles County, had the third largest outbreak of any jail in the U.S., reaching more than 1,500 cases.<sup>7</sup> Indeed, the top 10 clusters of COVID-19 in the country are in jails and prisons.<sup>8</sup>

***“North County Jail in Los Angeles County had the third largest COVID-19 outbreak of any jail in the entire country.”***

In Los Angeles County, the impact of COVID-19 will fall most heavily on communities of color and people held in the jail pretrial who are unable to afford their bail amount. People of color face disproportionate rates of incarceration in the County, and racial disparities in the jail have been exacerbated during the pandemic.<sup>9</sup>

**Table 1: Percentage of the Jail Population by Race Over Time**

	% of the jail population on January 10, 2020	% of the jail population on September 10, 2020
<b>Black</b>	<b>28.9%</b>	<b>29.7%</b>
<b>Hispanic</b>	<b>51.9%</b>	<b>54.2%</b>
<b>White<sup>10</sup></b>	<b>15.1%</b>	<b>12.3%</b>



The most recently available data indicate that 44% of people incarcerated are held there pretrial.<sup>11</sup> Declarations from individuals incarcerated in the County show that 94% of pretrial declarants do not anticipate that they will be able to afford bail. Thus, being incarcerated pretrial due to the inability to pay bail means that an individual's income could mean the difference between life or death in the County's jails. The consequences of this system of unequal pretrial detention will disproportionately affect communities of color, who face greater barriers to paying bail.<sup>12</sup>

Incarcerated people have higher rates of pre-existing health conditions than the general population.<sup>13</sup> Comorbidities enhance the mortality and severity of COVID-19.<sup>14</sup> Almost 13 % of people incarcerated in the jails are over 50 years of age.<sup>15</sup> 66% of declarants incarcerated in the County jails reported having a chronic health condition.<sup>16</sup> 39% reported having an underlying respiratory disease, 9% stated they have an underlying heart disease, and 17% of declarants have an underlying chronic liver and kidney disease. People incarcerated in jails with these conditions are more likely to have severe COVID-19 symptoms, and these health conditions have been correlated with an increased risk of in-hospital death and lifelong consequences from COVID-19.<sup>17</sup>

As of the writing of this report, LASD reported 3,701 cases of COVID-19 among people incarcerated, and nine deaths, while the Los Angeles County Department of Public Health reported 13 deaths across the County's six jails.<sup>18</sup> The true number of COVID-19 cases and deaths may never be accurately reported.<sup>19</sup> In late July, the California Board of State and Community Corrections admitted that detention facilities were substantially underreporting their COVID-19 statistics.<sup>20</sup>

**Table 2: COVID-19 deaths by jail facility**

Century Regional Detention Facility	1
Men's Central Jail	5
North County Correctional Facility	1
Pitchess Detention Facility (North & South)	2
Twin Towers Correctional Facility	4



Data gathered from declarations of people incarcerated in the County's jails also point to the potential of underreporting, as 36% of declarants reported receiving positive COVID-19 tests. Even this is likely an underrepresentation of the total number of positive cases as 5% of declarants indicated that they had COVID-19 symptoms but were never tested. Additionally, 31% of declarants that were tested for COVID-19, never received their test results. Even more alarming is that 25% of declarants who were tested but never received their test results reported having symptoms of COVID-19. One individual incarcerated at Men's Central Jail since April 8, 2020 indicated he had never been tested, even though "I had all symptoms, even loss of smell and taste but never received no treatment...I have asthma and could of [sic] died."<sup>21</sup>

## **IV. People Incarcerated in Los Angeles County's Jails are Spending More Time in Custody Now than Prior to the COVID-19 Pandemic**

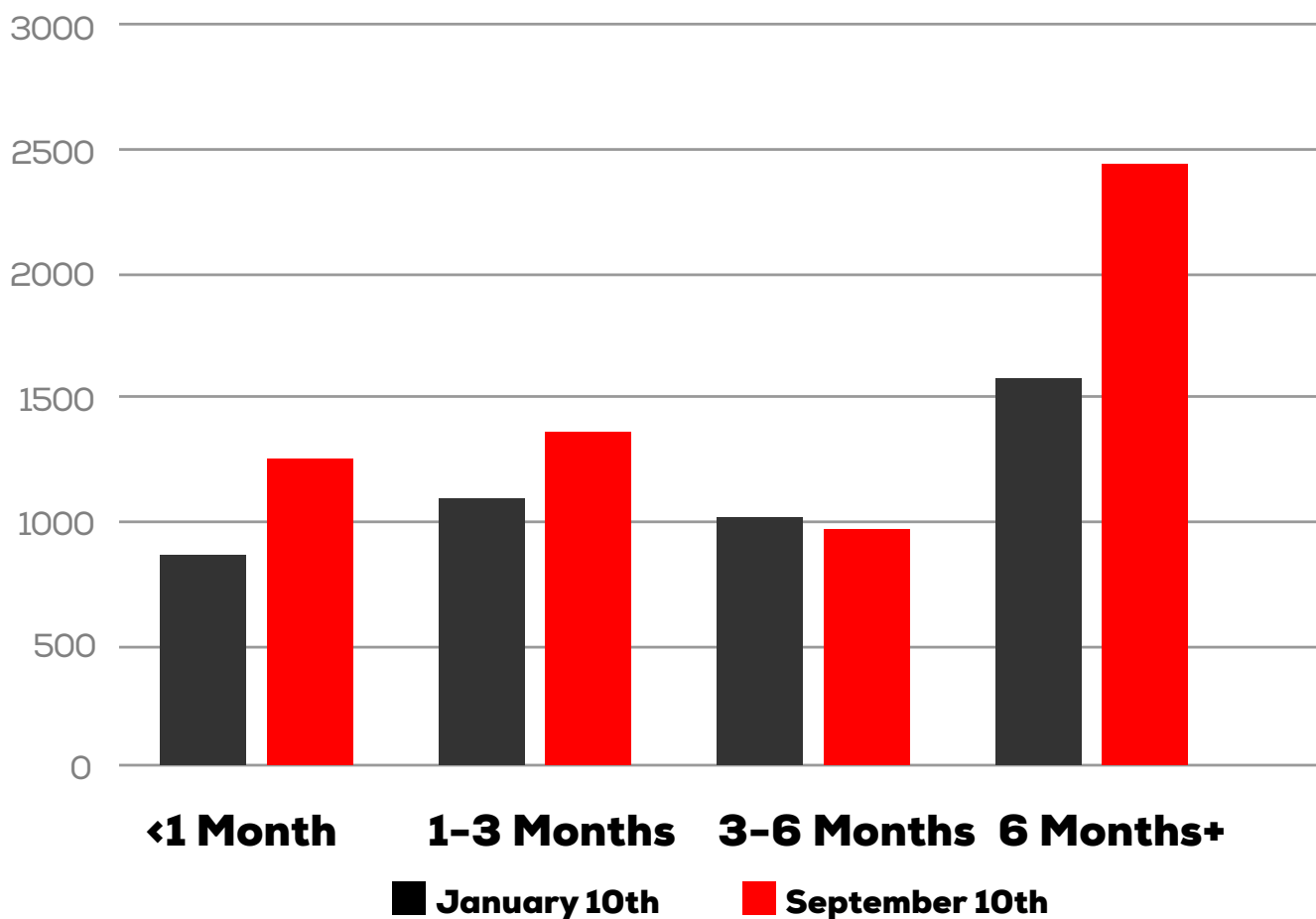
*One of my clients, after his arraignment, was not transported to court for 60 full days because he was quarantined multiple times, causing this lengthy delay in his court date.*

*-William Hayes, Deputy Public Defender, Los Angeles County*

Jail data and 407 declarations analyzed indicate that during COVID-19, individuals incarcerated in the County's jails are spending longer periods of time in custody than before the pandemic. Currently, the average number of days in custody of someone in pretrial detention is 221 days – over 7 months.<sup>22</sup> This is not the total length of their pretrial detention—it is not possible to know how long people currently in custody will ultimately be held. Rather, this is the average of how long people incarcerated pretrial have been in custody to date.

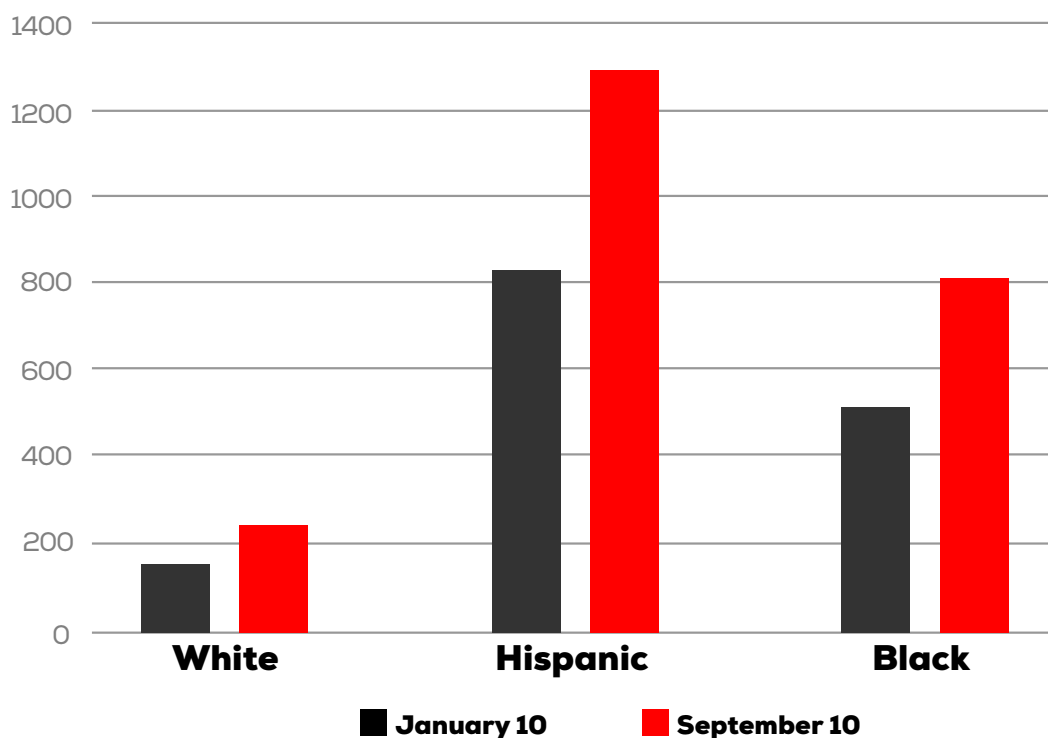
Taking County jail data from a point in time pre-pandemic—January 10, 2020—data indicates that 35% of the pretrial population on that date had been in custody for six months or longer. To control for differences in offenses, data was only analyzed for the pretrial jail population where an individual's bail amount was set at \$50,000 or more. In comparison, on September 10, 2020, 41% of the jail's pretrial population had been in custody for six months or longer.

Figure 1: Length of Custodial Time Pre and Post Pandemic Measured in Days



The racial disparities in the length of custodial time pre and post pandemic are stark. This is especially true for Black people held pretrial. While approximately 36% of Black people detained pretrial on January 10 had been in jail for 6 months or longer, that number jumped to about 44% by September 10, an 8% increase, compared to smaller—but still significant—increases among white and Hispanic individuals.<sup>23</sup> Also concerning, given the substantially greater risks COVID poses to people of advanced age, is the facts that people fifty years and older are being held for longer periods of time as well. 36% of people fifty years and older detained pretrial on January 10 had been in jail for 6 months or longer; that number jumped to about 43% by September 10, a 7% increase.<sup>24</sup>

Figure 2: Numbers of People with Pretrial Custodial Stays Six Months and Longer by Race



Given the high rates of COVID-19 in the County jails, as well as in the community at large, government and justice system actors should be taking every appropriate measure to prevent illness and death inside of carceral facilities. Instead, they have contributed to unduly prolonged incarceration for the legally innocent in two ways: 1) statutory trial delays at the state and county level; and 2) improper public health practices in the jails that have recklessly and repeatedly exposed people to COVID-19, leading to multiple and successive quarantines, thus denying them access to courts and counsel, sometimes for months.

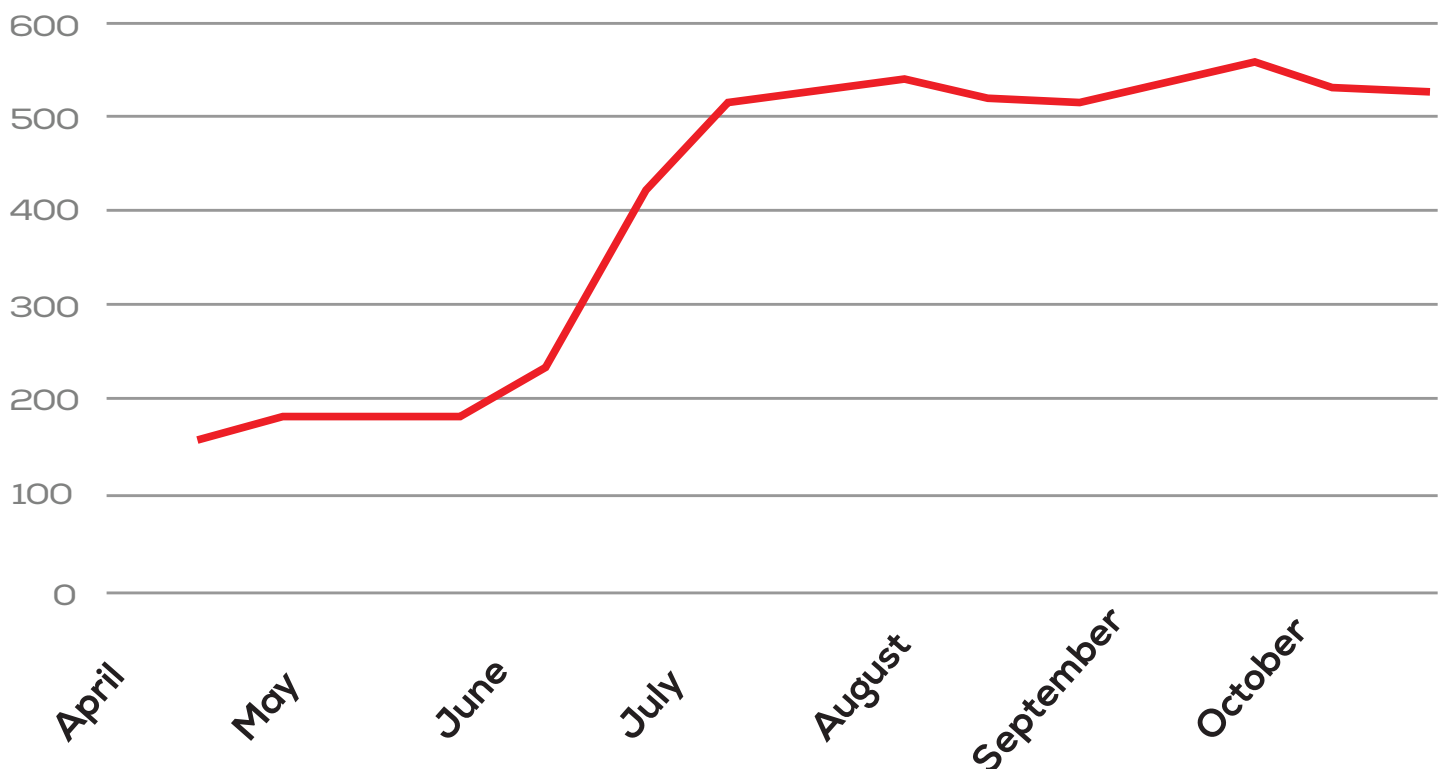
### ***A. During the Pandemic Courts Have Instituted Blanket Trial Delays***

On March 23, 2020 the Judicial Council of California, under the authority of statutes related to states of emergency, unilaterally extended all criminal trials by 60 days.<sup>25</sup> Simultaneously, they gave individual counties discretion to conduct earlier trials, as long as there was a finding of good cause. Subsequently, on March 30, the Judicial Council authorized county superior courts to further extend criminal trials by 60-day increments at their discretion. On April 29, the Judicial Council amended their initial order by extending trial delays in criminal proceedings by an additional 30 days, making the total extension 90 days. The order clarified that these extensions would apply to all criminal cases where the last date on which the trial could be conducted under state law would occur between March 16, 2020 and June 15, 2020. As a result of these orders, 48 of the 58 counties in California adopted orders that adhered in full or in part to these authorized extensions. While the Judicial Council's original statewide order expired on May 21, several counties have continued to delay jury trials.

While courts may have initially been ill-equipped to deal with this unprecedented public health crisis, many acted quickly to safely reinstate jury trials. For example, San Francisco County's last order to extend trials was issued on April 30, 2020 and authorized an extension for trials to be delayed by no more than 90 days, only for cases set to be heard from March 16 through June 15, 2020.<sup>26</sup> Other counties authorized longer delays, with Alameda County's final delay in criminal trials lasting through August 14, and San Mateo County's delays lasting through September 30. Still other counties, like Los Angeles County, Contra Costa County, and San Bernardino County, have been unwilling to make changes to accommodate for criminal trials and continue to extend trials through at least mid-December. These orders have infringed upon the speedy trial rights of people in pretrial detention because they have led to longer periods of incarceration in crowded and deadly facilities that have failed to effectively mitigate the spread of COVID-19.

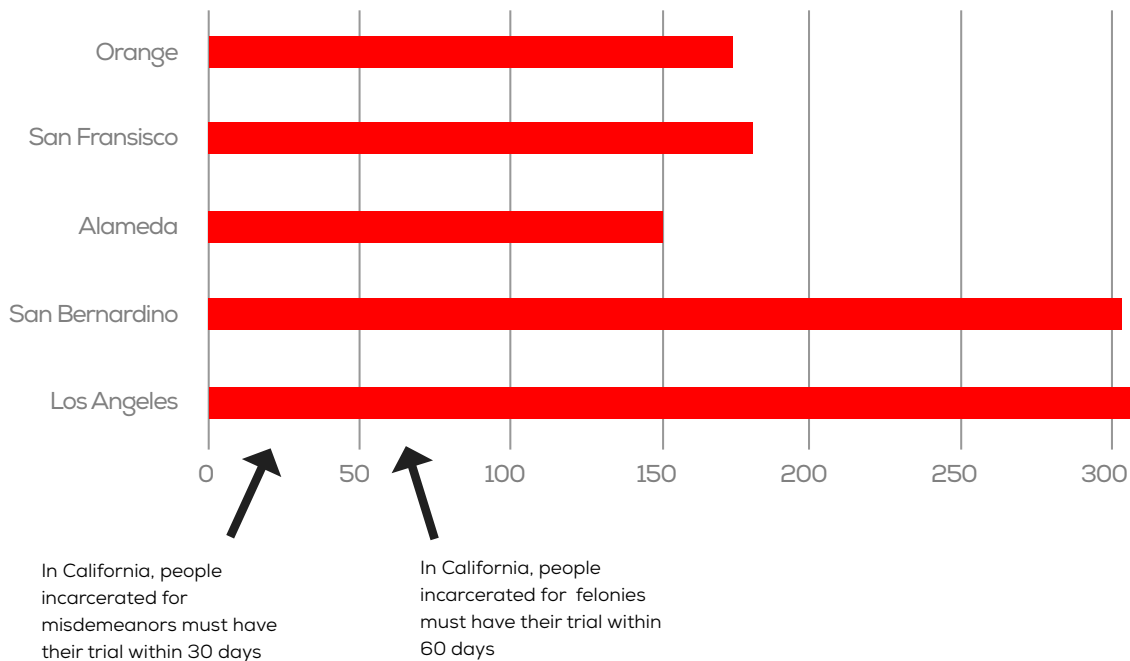
In Los Angeles County, the Presiding Judge Kevin C. Brazile has issued eleven orders since March, all approved by the Chief Justice of California.<sup>27</sup> Not a single criminal jury trial was completed in the County between March 17, 2020 and September.<sup>28</sup> Due to this complete standstill of trials, as of September, the County had 7,000 criminal cases that had yet to be tried.<sup>29</sup> Despite this, the County continues to book hundreds of individuals into jails every day.

Figure 3: Average Daily LASD Bookings



On September 9, Judge Brazile issued an emergency order, further delaying criminal trials that had statutory deadlines between September 14 and November 12. Judge Brazile's most recent order, issued December 3, 2020, delays criminal trials yet again until December 31, 2020.

Figure 4: Length of Court Ordered Trial Delays by County



***B. The Los Angeles Sheriff's Department Failure to Mitigate the Spread and Overuse of Quarantine Practices Exacerbates Delays in Criminal Cases***

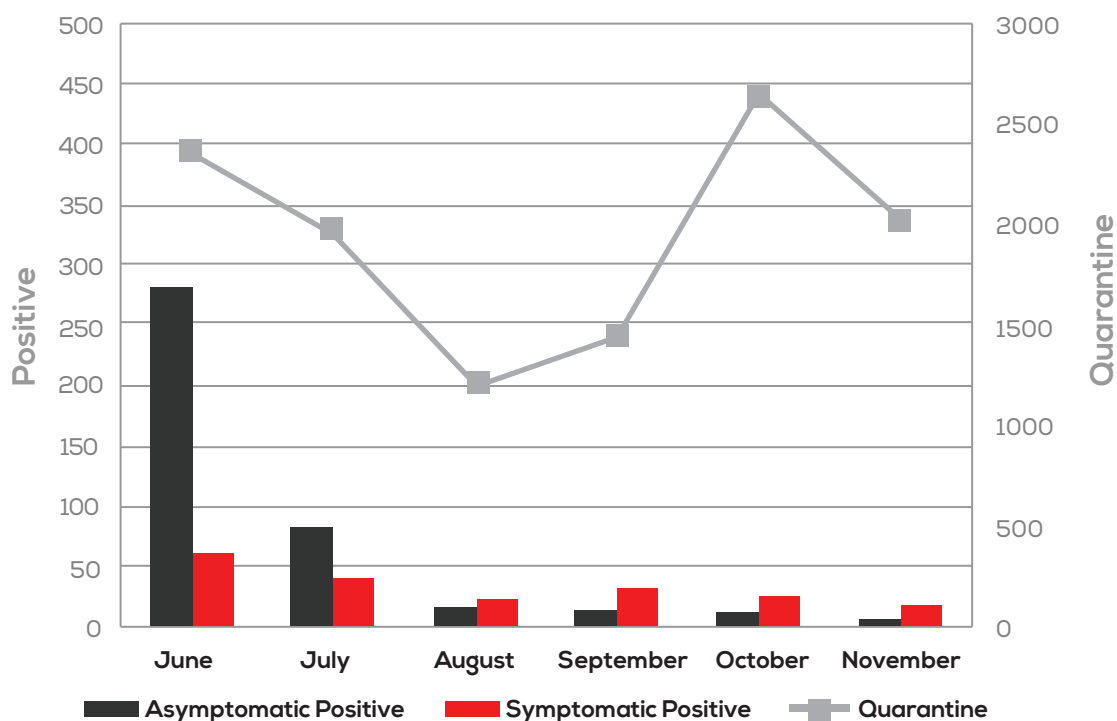
*No I don't feel safe in a whirlpool of COVID-19...exposed consistently! [The jail is] moving trustees with general population, intermingling those leavin [sic] module and returning back, placing me in harms way...coming across within 6 feet of [a] female who just returned from hospital positive, no mask.*

*-Declaration from individual incarcerated in the Century Regional Detention Facility*

In addition to the delays in trial dates, LASD practices have led people who are incarcerated to be repeatedly exposed to COVID-19 due to the constant movement in and out of the jails and between housing units. If a person (or persons) incarcerated in the jails is believed to have been exposed to COVID-19, their entire housing unit will be placed on quarantine.<sup>30</sup> With over 221,600 jail employees throughout the country,<sup>31</sup> physicians believe that most COVID-19 cases in jails originate from staff—not from people who are incarcerated—due to staff's movement in and out of the jails.<sup>32</sup> Further, individuals in the jails who have work assignments (known as "trustees") frequently move between housing units, often moving between units that are quarantined and those that are not. One individual in pretrial detention wrote in his declaration that he has been placed in quarantine four times, stating the jail has rehoused "inmates who tested positive or showed symptoms right next to one another with negative inmates...I can personally name numerous inmates who were housed amongst us."<sup>33</sup>

The County's Sheriff Civilian Oversight Commission (COC) has received several complaints alleging deputies and jail trustees move between quarantined and non-quarantined areas without taking proper precautions.<sup>34</sup> The COC also reported that individuals are not re-tested or isolated when they are transported in and out of facilities and that testing for jail staff is not mandatory.<sup>35</sup> There does not seem to be any LASD policy or practices that limits this movement, which causes unnecessary risk of exposure, leading to an overreliance on quarantine practices rather than focusing on preventing the spread, as can be seen in Table 2.

Figure 5: Monthly Median Number of Quarantined Individuals by Positive Test Rates



This illustration highlights the dramatic fluctuation in numbers of individuals who have been placed on quarantine. Since March, between 9% to 20% of the total jail population has been on quarantine in the jails, at any given point in time.<sup>36</sup> While in June, the numbers of positive cases were high, which would indicate some reasonable need to quarantine more people, this is less and less true as time goes on, and yet the quarantine numbers remain high. A sound, targeted practice would result in less need to quarantine as cases decline. It appears, unfortunately, that LASD is making haphazard use of their makeshift quarantine, as the rates fluctuate independently from the number of positive tests at any given time.

LASD's quarantine practices have a huge impact on individuals' access to courts and counsel. When individuals are placed on quarantine, they are not transported for their court hearings, they cannot be transported to medical appointments, cannot be released from custody, and often cannot meet with their attorneys.

*As students in the bail practicum, we successfully argued for the release of one of our client's pretrial. He should have been released immediately pursuant to the judge's order. However, after this hearing, he was not released for weeks due to his housing unit being placed on quarantine. A bed was available for him to be released to, but by the time his quarantine was lifted, the bed was no longer available, and he had to wait even longer to secure another bed. This client had already been put on quarantine at least once before, which also interfered with our ability to meet with him and prepare for his hearing.*

*—Rachel Levin & Andy Phillipson, students in UCLA School of Law's Bail Practicum*

From a review of over 400 declarations of individuals incarcerated in L.A. County jails, 88% indicated that they were subject to quarantine at least once because they were exposed to COVID-19. 64% of declarants currently reported that they missed a court date since the start of the COVID-19 pandemic. Moreover, most people who are incarcerated have been placed in quarantine several times, and many have been quarantined 5-7 times throughout the duration of the pandemic.

As the Los Angeles Times reported in its article about ever-increasing public defender caseloads and court backlog, "with clients frequently subject to quarantines, hearings have to be continued again and again while caseloads balloon with new clients entering the system."<sup>37</sup> One individual indicated he was not transported to court on seven different occasions, two of which were trial dates. This same individual was quarantined "3 times for 6 weeks, and when we're on [quarantine] they not suppose [sic] to put people on the row, but they still do and sometimes they're sick...that's why we keep being on quarantine. It's not going to stop. We keep missing court. It's not fair."<sup>38</sup>

LASD's inadequate response to preventing the spread of COVID-19 within their facilities is directly responsible for causing further delays in court dates and case resolution because quarantine practices prevent people from being transported to court. Together, the authorized delays in court dates, the failure to combat COVID-19 in jails, and the incessant quarantining of inmates has violated individuals' constitutional right to a speedy trial, prevented prompt release from custody when ordered, and impeded the swift resolution of cases. Despite the fact that it has been more than eight months since the initial delays in trials, jails continue to struggle with containing the spread of COVID-19, deadly outbreaks in jails continue to occur, and trials continue to be delayed.



## V. Trial Delays Caused by Continued Judicial Extensions and Quarantine Practices Violate Constitutional Rights

*I've had symptoms, but I've not received any medical treatments or test results. I am extremely stressed about my mother's health and my rights to due process/trial etc. being violated.*

*—Declaration from an individual incarcerated in the Twin Towers Correctional Facility*

Quarantine practices and judicially sanctioned trial delays have unlawfully contributed to overcrowding of the jails and people being unable to access the courts. The right to a speedy trial is a foundational component of the U.S. and California systems of constitutional criminal procedure. Even as the County resumes jury trials, continued delays during the COVID-19 crisis push the boundaries of what is acceptable under the law.

The California Constitution's right to a speedy trial<sup>39</sup> exists in order to 1) protect against prolonged imprisonment; 2) gain speedy relief from facing an untried accusation of crime; and 3) prevent the loss of evidence for trial. All of these protections are at risk due to the COVID-19 pandemic and the indefinite trial delays that have resulted.<sup>40</sup>

California speedy trial statutes are meant to be an additional and decisive shield against such prolonged and dangerous incarceration. To this end, the California penal code sets out strict time limits within which stages of a trial must be carried out; the sole remedy for a violation is dismissal.<sup>41</sup> Still, during this health emergency and in prior emergencies, California courts have interpreted the law so that it has no practical effect, being all-too-willing to delay trials for people incarcerated, but in many jurisdictions unwilling to take the necessary steps to prioritize cases for trial and make courtrooms safe for trials to continue.<sup>42</sup> But the current public health crisis is nothing like the health crises of the past. It has made jails deadly for those awaiting trial and threatens to prolong trials beyond the longest time period legally presumed to be reasonable: one year.<sup>43</sup>

In an acknowledgement of the importance of jury trials and the constitutional rights implicated by indefinite delays, many California courts have begun reversing course on jury trial suspensions, while still ensuring juror safety with appropriate safeguards. A majority of California's trial courts re-initiated jury trials months ago, including San Francisco, Alameda, and San Joaquin counties.<sup>44</sup> While some counties have reinstated restrictions and extensions due to the surge in COVID-19 rates, Los Angeles County still held no trials between March and September and continues to impose extensions. This means Los Angeles County is likely an outlier in having a backlog of over 7,000 cases, which will continue to grow as trials continue to be delayed. This backlog is weighing

down the County's Public Defender's office, with public defenders stating that during the pandemic their workloads have doubled or tripled.<sup>45</sup> Even if there are no more trial extensions after December 31, 2020, people who are incarcerated pretrial will still have to wait an unprecedented amount of time for a trial, in violation of their constitutional rights, as explained below.

Under the California Constitution, when a person accused of a crime asserts that their speedy trial rights have been violated, the court weighs the prejudice to the individual caused by the delay against the justification for the delay provided by the prosecution.<sup>46</sup> A similar balancing test is used to assess whether the government has "good cause" for delay under California statutes.<sup>47</sup> In the federal context, the right to a speedy trial is so prized that even a trial that is unsafe, but possible, must go on.<sup>48</sup> The federal standard does not allow blanket delays of trials, only delays which are individually determined to be appropriate under the circumstances. Inconvenience does not justify delay.<sup>49</sup>

In September 2020, the District Court for the Central District of California ruled in *U.S. v. Olsen* that the pandemic did not allow the court to deny a defendant his constitutional right to a speedy trial when "clearly, conducting a jury trial during this coronavirus pandemic is possible."<sup>50</sup> The court bolstered this contention by explaining that "grand juries are convening in the same federal courthouse in Orange County where [this] trial would take place and state courts, just across the street from that federal courthouse, are conducting criminal jury trials."<sup>51</sup>

As trial delays stretch into winter and other counties throughout the state are finding ways to resume trials, claims of prejudice by people incarcerated in County jails are getting even stronger, as the state justifications for delay are becoming insufficient. For months, other counties have shown that it is not only possible to hold a jury trial, but that it can be done safely.

While Los Angeles has finally resumed jury trials, there is a significant backlog and there are still too many people incarcerated in violation of their speedy trial rights. Even if public safety concerns could have at one point justified the delay of a particular proceeding, the fact that some 16 courts have been able to conduct trials notwithstanding the public health crisis should indicate there is no longer a reasonable justification for delaying trials. Going forward, Los Angeles County cannot point to delays of its own making to justify further delays. Trials that cannot be held during their prescribed timelines should be dismissed, not continued.

When speedy trials are denied to people who cannot afford bail, an additional constitutional violation ensues: prolonged incarceration on the basis of poverty. That some people accused of crimes must remain incarcerated for lengthy periods of time while their cases are delayed and others can await their trial in freedom simply because they can afford to pay bail violates the Equal Protection Clause of the Fourteenth Amendment of the US Constitution and a recent California case, *In re Humphrey*. In the *Humphrey* case, the California Supreme Court recently affirmed that California law prohibits the differential imposition of detention based on the wealth of an individual.<sup>52</sup>

## **VI. Prolonged Detention and Court Delays Create Additional Legal, Health and Economic Harms**

The COVID-19 crisis isn't going anywhere soon. As of December, states throughout the country are reaching record new infections, with an average of over 200,000 new cases every day between December 6 and December 13.<sup>53</sup> In L.A. County alone, the five-day average for new cases recently reached 10,000.<sup>54</sup> There is little hope of a sudden abatement of this crisis. If the Judicial Council, LASD, and other policymakers do nothing, unnecessarily prolonged incarceration will continue for many, and for a period of time that is currently uncertain. This not only violates their speedy trial rights but results in a number of negative consequences that the County must take steps to avoid.

### **A. Prolonged Delays in Trial Under the Threat of COVID-19 in Jails Can Exacerbate the Already Coercive Nature of Plea Bargaining**

*I had a client charged with a 2nd time DUI who wanted to go to trial. I typically would advise him to move forward with the trial, but the risk for this specific client was too great given COVID. He was older with underlying health conditions-heart issues and diabetes. but he felt the risk was too great given COVID and his underlying health conditions. I told him what the possible terms would be like if we lost at trial: there was mandatory jail time given the 2nd time DUI charge, but the pretrial offer did not include any jail. Even if he had 24-36 hours in jail, I knew that could easily turn into 14+ days if he were quarantined, so he accepted a plea.*

*—Cameron Gomez, Deputy Public Defender Los Angeles County*

Prolonged periods of incarceration, especially in light of the dangerous conditions in jails, threaten to worsen yet another plague of modern US criminal practice: coercive plea bargaining. Prior to the pandemic, approximately 95% of criminal convictions were based on guilty pleas, most of which resulted from plea bargaining.<sup>55</sup> The trend is so strong that the US Supreme Court has said plea bargaining "is the criminal justice system."<sup>56</sup> Plea bargaining is inherently coercive, especially when the person accused of a crime has to negotiate while incarcerated. Many people held in pretrial detention will take a plea when offered immediate release in exchange for their plea, regardless of the many collateral consequences their plea will bring, and regardless of their innocence. With the fear of contracting COVID-19 in the jail being so predominant, it is likely that one outcome of this pandemic will be higher rates of criminal convictions exchanged for the "relief" of getting out of custody that often comes with a guilty plea.

## ***B. The Spread of COVID-19 in the Jails Can Affect the Surrounding Communities***

*I know if I was in the safety of my own home during this pandemic with my family, I wouldn't of [sic] contracted the virus. Now I am unable to visit my children and elderly parents upon my release.*

*--Declaration from an individual incarcerated in Los Angeles County*

Failing to measurably reduce the jail population and continuing to book people into jails harms the general population by increasing the risk of community spread. There is a significant risk of transmission to the larger community, originating from the jails, because millions of people cycle through U.S. jails every year. In 2018, the U.S. Bureau of Justice Statistics reported that jails held 734,800 people nationwide and jails reported a total of 10.7 million admissions.<sup>57</sup> With constant movement in and out the facilities, jail staff, vendors, lawyers, corrections officers, and medical staff all serve as vectors for the spread of COVID-19.<sup>58</sup>

A study from the ACLU found that jails could account for a 56% increase in deaths in L.A. County, a 232% increase in San Bernardino County, a 196% increase in San Diego County, a 51% increase in Santa Clara County, and a 133% increase in San Mateo County.<sup>59</sup> Similarly, one study did a simulation of a jail with 2,500 inmates, a surrounding population of 1.2 million people, and an incarceration rate of 40 people per day. The results suggested that over 180 days, absent any intervention to prevent the spread of COVID-19, an outbreak could cause 926,108 cases of COVID-19 and 12,133 deaths in the general population.<sup>60</sup> Unsurprisingly, the threat of community spread has already been manifested throughout the state.

Despite these troubling statistics, officials fail to recognize that as long as COVID-19 remains within jails, it will continue to wreak havoc on our communities. Jails are not closed facilities and the risk of community spread is extremely high as people are constantly arrested, incarcerated and released, and jail employees filter in and out of jails on a daily basis. Further, if individuals are not offered testing before they are released back into the community, they and their loved ones cannot make safe and informed decisions about housing upon release, which could unknowingly spread the virus.

### ***C. Prolonged Detention and Case Backlogs Can Result in Increased Costs to the County***

As people are forced to stay in jail for longer periods of time, the County will have to account for the additional expenses associated with the daily housing costs of incarceration and preventing and treating COVID-19 among people who are incarcerated. A national study found that counties are simultaneously experiencing increased expenditures and decreased revenues, and that 71% of county revenue comes from sources that are threatened by economic downturns associated with COVID-19.<sup>61</sup> Specifically, the justice sector is at high risk of additional costs because of the need to provide high populations of incarcerated people with masks, disinfectant, soap and health care.<sup>62</sup>

Despite these stark deficits, it is possible for counties to counter these budgetary obstacles. For example, during the height of the pandemic, the San Francisco County Sheriff's department had a \$4.7 million surplus that was repurposed to the COVID-19 emergency response.<sup>63</sup> With the closure of a jail, and with the incarcerated population dipping below 700 individuals,<sup>64</sup> the Mayor of San Francisco has proposed a \$14.8 million dollar reduction in the proposed budget for the Sheriff's Department, bringing the budget from \$260.8 million to \$246.1 million, a 5.7% decrease.<sup>65</sup> The District Attorney for San Francisco County, Chesa Boudin, explained: "I started emptying out our [...] jails because those living and working there face a grave risk of falling ill, dying, and spreading COVID-19."<sup>66</sup>

Instead of reducing the jail population to protect the lives of people who are incarcerated and reduce costs, like in San Francisco County, L.A. County has opted to decrease funding and increase the jail population, despite the increasing costs of doing so. Before the COVID-19 pandemic, the cost of maintaining L.A.'s overcrowded jails system was tremendous - the average yearly cost of incarceration amounted to \$43,000 per person, and the daily cost ranged from \$95 to \$140 per person.<sup>67</sup> With a budget shortfall of \$940 million, LA. County recently approved a budget that decreased county spending by \$453 million.<sup>68</sup> Thus, if the jail population is not reduced, counties face the decision of putting incarcerated people's lives at greater risk by decreasing funding or increasing operating costs to mitigate the spread of COVID-19 in jails. While L.A. county has opted for the former, both costs and public health consequences for incarcerated people can be reduced by increasing pre-trial release.

## VII. Recommendations

Los Angeles County must act now to keep people incarcerated safe. Due to the fact that the rates of COVID-19 are increasing, the County should be actively decreasing the number of people in the jails. There have been some positive steps in this direction, as the newly-elected Los Angeles District Attorney, George Gascón, instated policies on cash bail and declination of misdemeanor prosecutions that could lead to a reduction of the jail population both retroactively and into the future.<sup>69</sup> The County is still awaiting the impact of these new policies, however there are other actions the County and LASD can take now to keep people safe, prioritize cases for resolution, and conduct safe trials. These recommendations are outlined below.

### ***1. Reduce the Jail Population by Using Appropriate Release Procedures and Decreasing New Bookings***

Reducing jail populations can curb the spread of COVID-19. San Francisco reduced their jail population by 40% since March 16, 2020.<sup>70</sup> Unlike Los Angeles County, San Francisco has maintained its lower population.<sup>71</sup> Data also shows that these reductions can be made without compromising public safety, as in comparison to similar months in other years, San Francisco County crime rates have fallen.<sup>72</sup> A recent court decision ordered that the Orange County jails reduce the population by 50% in all congregated living areas. The court recognized that social distancing is the “cornerstone of reducing transmission of respiratory diseases” and that social distancing was impossible in the jails at their current population.<sup>73</sup>

The County’s jail population was significantly reduced at the beginning of the pandemic, and yet instead of maintaining that population, bookings continue to increase. Because it has already been done, it is feasible to once again achieve a population reduction under 12,000 if not well-below that number. As of October 23, 2020, 44% of the jail population was incarcerated pretrial.<sup>74</sup> Under both Humphrey and the federal Equal Protection Clause, bail amounts must be reassessed to ensure that people currently held in pretrial detention are not being held on the basis of their wealth. Given that only 19 of the declarants – less than 5% – can pay the bail set for their cases, it is more than likely that they, and many others, are being held pretrial in violation of the Equal Protection Clause of the U.S. Constitution, and it is imperative that the County’s decisionmakers take action to reduce bail and depopulate the jails quickly. These individuals should be considered for release.<sup>75</sup> Medically vulnerable people should also be prioritized for release, both those held pretrial and people who are sentenced.

Additionally, mathematical models show that minimizing arrests and new jail bookings will have a significant effect on reducing of infections within the incarcerated population, and correspondingly fewer hospitalizations and deaths.<sup>76</sup> Reducing the numbers of people in the jail would allow for social distancing, minimize the movement within the jails, leading to less spread and alleviating the flawed quarantine practices of LASD.<sup>77</sup>



## **2. Mitigate the Spread of the Virus in Jails and Prevent the Overuse of Quarantine Practices**

LASD should stop placing people who have been or may have been exposed to COVID-19 into housing units that remain un-exposed. This means a person who is newly booked into the jail and offered testing, should never be housed within a congregate unit without receiving a negative test result first. When individuals are transported to court or medical appointments, upon return, they should be housed apart from their normal housing module, offered testing, and frequently monitored for symptoms prior to being assigned back to their housing unit. Sheriff deputies should not be allowed to move between modules nor should individuals who are incarcerated who have work assignments.

LASD should develop a different quarantine policy in collaboration with experts who specialize in carceral housing classification and epidemiology. This quarantine policy should take into consideration the pretrial population, which needs to access the courts and counsel more regularly than the sentenced population and ensure that people can make their court dates.

## **3. Safely Ramp Up Jury Trials**

*I started bringing masks myself in my court bag and I give them to clients. There is no social distancing in the courtrooms. There are no temperature checks of people entering the courthouse and no temperature checks conducted of jurors. Out of custody clients are coming into the courthouse for non-essential hearings and some are coming in infected. I had to go on quarantine a few months ago because one of my clients came in full blown ill with COVID.*

*—Jennifer Valdez, Deputy Public Defender, Los Angeles County*

To be able to safely resume jury trials in the County, it is of paramount importance that social distancing and public health orders are actually enforced in courthouses. As a threshold issue, as our first recommendation proposes, it is most important to release as many people as possible. If there are fewer people in custody, there will be fewer jury trials for people in-custody that need to be prioritized. However, it will still be necessary to resume jury trials as the trial delays are already violating individuals' constitutional rights.



Resuming jury trials is a contentious issue. There are concerns for the well-being of criminal defense attorneys, prosecutors, judges, court staff, witnesses, and jurors when they are required to convene for a trial. When citizens are unable or reluctant to serve on juries due to the health risk, the concern becomes the possibility that juries will not reflect a fair cross section of the population.<sup>78</sup> There is also the concern that jurors will be angry about the requirement to come to court during a pandemic and will take out their frustrations on the person facing trial. Attorneys and other court staff are forced to put themselves at risk of contracting COVID-19. With that in mind, people who are incarcerated deserve their right to a speedy trial. Release resolves the tension between these two problems.

As highlighted by the Olsen court, juries have in fact convened during the COVID-19 health crisis. From June to September, the Orange County Superior Court held 82 criminal jury trials and 4 civil jury trials. Los Angeles County held no trials during this time. Notably, in July, over 60% of potential Orange County jurors reported to fulfill their civic duty.<sup>79</sup> Orange County is taking numerous careful measures to ensure safety in the courthouses. It accommodates physical distancing by staggering times for juror reporting, trial start, breaks, and seating jurors during trial in both the jury box and the audience area, marking audience seats, and using dark courtrooms as deliberation rooms. It also regularly disinfects the jury assembly room and restrooms, provides facial coverings, uses plexiglass shields in courtrooms, and requires trial participants to use gloves to handle exhibits.<sup>80</sup> Each county should be able to develop specific safety mechanisms that will allow jury trials to occur before the backlog becomes even larger than it already is.

## **Criminal Jury Trials June – September 2020**



In September, the Department of Public Health conducted a site assessment of five Los Angeles County courthouses. Six months into the pandemic and the Department of Public Health noted numerous issues including social distancing not being adhered to in lock-ups and interview rooms, sub-optimal ventilation in lock-ups and interview rooms, hand sanitizer was not wellstocked or available in several areas, several staff and visitors were observed not wearing masks, and a lack of in-person screening for COVID-19 at entry-points.<sup>81</sup> The report made recommendations to ensure face coverings have been provided to all staff and inmates, ensure social distancing in any room – including lock up, ensure the availability of hand sanitizer, install plexiglass barriers where 6 ft of distancing is impossible, evaluate ventilation, enhance the frequency of cleaning, establish a process for timely notification of exposed staff across departments, and to explore and implement technology solutions whenever possible.<sup>82</sup>

Three months later, despite these recommendations, according to Court Watch LA, and public defenders who work across the County, the courthouses are crowded with no social distancing in elevators or in the hallways. There is a lack of mask compliance – especially by law enforcement officials – and no enforcement of the rules.<sup>83</sup> Even though Judge Brazile issued an order to limit the number of people allowed in LA County courthouses on November 23, 2020, implementation is lacking as can be seen in the photographs below taken by Court Watch Los Angeles.<sup>84</sup>



Clara Shortridge Foltz on Dec. 7, 2020. One of the third-floor courtrooms was unexpectedly locked, so everyone with scheduled appearances had to wait in the hallway.



Stanley Mosk Courthouse on Dec. 4, 2020. As of Dec. 9, 2020, there were 9 confirmed COVID cases at Mosk. Images taken from <https://twitter.com/CourtWatchLA>

The courts need to put in place mechanisms to enforce social distancing throughout all areas of the courthouses and to ensure everyone who is in the courthouse is wearing their masks at all time. The courts should allow attorneys to appear for their clients (misdemeanor and felony cases) for non-essential court hearings, to minimize the number of people appearing in court. Finally, Judge Brazile's only order where he indicated jury trials should be prioritized provided no guidance as to which trials should be of highest priority.<sup>85</sup> People incarcerated, whose trials are long past the statutory deadlines should either be released in a safe manner, or if safe release is impossible, their trials should be prioritized by the court.

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None of the above recommendations will work in a vacuum, but combined, they will help alleviate the untenable circumstances faced by people currently detained pretrial in Los Angeles County. Human beings who have been convicted of no crime are being held in dangerous conditions for longer rather than shorter periods of time during this pandemic, a fact that should seem counterintuitive to all who are aware of it. The steps outlined above are both plausible and necessary to protect their rights, their physical well-being, and perhaps their lives. Many of them are needlessly in custody despite being presumed innocent and should be released expeditiously. Those who remain deserve measures in place to keep them safe and to preserve their access to court, where they should be afforded their right to a safe and speedy trial.

# Endnotes

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- 17 Asthma's effect on COVID-19 has been of particular concern to the scientific community. Oyelade, supra note 14, at 1-2. One study has revealed that asthma correlated with an increased risk of in-hospital deaths. Id. at 3. Studies have found that individuals who contract COVID-19 and have underlying cardiovascular diseases (CVD) are at an increased risk of death. Brit Long, et al., Cardiovascular Complications in COVID-19, 38 Am. J. of Emerg. Med. 1505, 1506 (2020). Patients with CVD are at heightened risk of harm because COVID-19 can cause direct damage to heart receptors located in cardiac tissue, resulting in lifelong consequences. Id. Additionally, underlying liver and kidney diseases also pose a greater danger to the lives of incarcerated people because studies have found severe COVID-19 symptoms in over 53% of people with liver diseases and over 83% of people with kidney diseases, likely because of their weakened immune systems. Oyelade, supra note 14, at 9.
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39 The California State Constitution states that "[t]he defendant in a criminal case has the right to a speedy public trial." CAL. CONST. art. I, § 15. Statutory speedy trial provisions in California supplement this state constitutional guarantee, but the speedy trial right is self-executing and broader than its statutory implementation. *People v. Martinez*, 22 Cal. 4th 750, 766 (2000). A defendant's right to a speedy trial can be violated, even absent a statutory violation. Id.

40 See *Craft v. Superior Ct.*, 140 Cal. App. 4th 1533, 1540 (2006).

41 California Penal Code Section 1382 sets out time constraints for how quickly after arraignment a person accused must be brought to trial. For felonies, the period between arraignment and trial may not exceed 60 days if the person accused is in custody or 90 days in all other cases. CAL. PEN. CODE § 1382 (West 2020). For misdemeanors, the period between arraignment and trial may not exceed 30 days if the person accused is in custody or 45 days in all other cases. Id. If the person does not have their trial within these time constraints, the Court must dismiss the case, unless the person accused waived their statutory right to a speedy trial or good cause is shown to extend the time period. Id.

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46 *People v. Lowe*, 40 Cal. 4th 937, 942 (2007).

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48 *U.S. v. Olsen*, 467 F. Supp. 3d 892, 893-98 (C.D. Cal. 2020). ("If it is possible for the court to conduct a jury trial, the court is constitutionally obligated to do so. There are no ifs or buts about it").

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50 *Olsen*, 467 F. Supp. 3d at 893-98.

51 Id.

52 The court in *In re Humphrey* signaled a monumental shift in pretrial detention law by holding that pretrial detention is unconstitutional if it is on the basis of a person's inability to pay. After the validity of the decision was brought into question by a decision of the California Supreme Court to review it, the California Supreme Court issued an order restoring precedential value to the portion of the opinion requiring that bail only be set pursuant to an individualized assessment, and that pretrial detention may not be effectuated on the basis of a person's inability to pay. California Supreme Court Docket, *Humphrey* (Kenneth) On H.C. available at <[https://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc\\_id=2245014&doc\\_no=S247278&request\\_token=NilwLSEmXkg%2FWIBZSCFNUENIMEg0UDxTjYMuTzIRMCAGcG%3D%3D](https://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=2245014&doc_no=S247278&request_token=NilwLSEmXkg%2FWIBZSCFNUENIMEg0UDxTjYMuTzIRMCAGcG%3D%3D)>.

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75 *Id.*

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77 *In re Von Staich*, 56 Cal.App. 5th 53, 84 (2020); the judge ordered a 50% population reduction in the population of San Quentin prison.

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79 *U.S. v. Olsen*, 2020 WL 6145206 (C.D. Cal. Oct. 14, 2020).

80 *Id.*

81 Environmental Emergency Management Program, *August 2020 COVID-19 Site Assessment of Five Court Facilities* (September 28, 2020).

82 *Id.*

83 Individuals took to Twitter to state that law enforcement specifically was not wearing masks, with one Twitter user stating, "Arrests and case filings are back to normal, so courthouses are already packed with "authorized persons." Same courthouses filled with police/ sheriff's refusing to wear masks." <https://twitter.com/alondora/status/1331090739791495168?s=20>; Court Watch Los Angeles also observed a similar phenomenon, "This week at Clara Shortridge Foltz (CCB) after waiting for an uncrowded elevator, a mother and son finally got on an elevator with 2 others. Even though the elevator was at capacity per courthouse policy, 2 @LASDHQ deputies got in the elevator with no masks and closed the doors." <https://twitter.com/CourtWatchLA/status/1330233706087403521?s=20>.

84 Superior Court of Cal., *News Release Presiding Judge Kevin C. Brazile Issues Order to Limit the Number of People Allowed in Los Angeles County Courthouses Amid Spike in County and Statewide COVID-19 Infections* (Nov. 23, 2020).

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