AMERICAN UNIVERSITY
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To: Maryland Criminal Defense Attorneys, Civil Rights Organizations, and Others Involved in Litigation Relating to Covid-19 and Maryland Jails and Prisons
From: American University Washington College of Law Criminal Justice Clinic
Date: April 24, 2020
Re: Potential Litigation and Administrative Avenues for Emergency Release of Incarcerated People during Covid-19 Outbreak

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Toolkit for Maryland Criminal Defense Attorneys, Civil Rights Organizations, and Others Involved in Litigation Relating to Covid-19 and Maryland Jails and Prisons

The following toolkit is intended to provide Maryland attorneys, both within and outside the Office of the Public Defender, with information on various litigation strategies that they might use to get individuals released from jail and prison. The memo also discusses strategies for addressing some of the other issues that have arisen due to the COVID-19 pandemic and crisis. We have included summaries of the law, application to this current time, and potential litigation strategies.

Students in the Criminal Justice Clinic at American University Washington College of Law developed the various sections below,[1] working with Professors Jenny Roberts and Katie Kronick. If you have any questions or would like additional resources, please feel free to reach out to Jenny, jenny@wcl.american.edu, and Katie, kronick@wcl.american.edu.

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I. Litigation Strategies

The following are litigation strategies that could be employed on behalf of individual clients, groups of clients, and to change policies and procedure. One litigation strategy that we do not address below are motions to reconsider a sentence—we know that OPD is already on top of these litigation efforts and did not believe we would be contributing above and beyond what OPD already knows and does. Furthermore, please note that because the Maryland courts are operating on an emergency only basis, many of these motions or actions should be explicitly titled emergency actions.

A. Maryland State Writ of Habeas Corpus Based on Eighth and Fourteenth Amendment Claims

1. Writ of Habeas Corpus

"The writ of habeas corpus is a common law remedy that was imported into Maryland law under Article 5 of the Maryland Declaration of Rights." *Sabisch v. Moyer*, 466 Md. 327, 369 (2019) (noting how Md. Code Ann., Cts. & Jud. Proc. § 3-702 "generally governs who may petition for a writ of habeas corpus"); *see also Olewiler v. Brady*, 185 Md. 341, 345 n.2 (1945) (explaining that the writ extends to "exceptional cases . . . where the writ is the only effective means of preserving his rights") (quoting *Waley v. Johnston*, 316 U.S. 101, 105 (1942)). Maryland courts have found the habeas writ to be the appropriate vehicle for challenging conditions of confinement. *Md. Corr. Inst. v. Lee,* 362 Md. 502 (2001). Maryland state habeas can be used to argue that an individual is being restrained unlawfully because of the conditions of the confinement during the COVID-19 pandemic, and therefore a judge should grant a writ of habeas corpus immediately.

Relevant Statues:
MD CTS & JUD PRO § 3-701. Authority to grant writ of habeas corpus.
MD CTS & JUD PRO § 3-702. Individuals who may petition for writ
MD Rules. §15-302. Petition.
MD Rules, §15-309. Hearing. (discussing hearings during public health emergencies)

2. Eighth Amendment Applies to Convicted Persons, and Unsafe Prison Conditions, Including Exposure to a Communicable Disease, Would Violate Eighth Amendment

Both the provisions in Maryland's Declaration of Rights and the federal Eighth Amendment (applied to the states through the Due Process Clause of the Fourteenth

Amendment) mandate that convicted individuals not be subject to unsafe prison conditions.[2] Article 16 and Article 25 of Maryland's Declaration of Rights in its Constitution provide the state's analogue to the Eighth Amendment.[3] These provisions "have usually been construed to provide the same protection as the Eighth Amendment." *Carter v. State*, 461 Md. 295, 308 n.6 (2018); *see also Thomas v. State*, 333 Md. 84, 102 n.5 (1993) ("Because the prevailing view of the Supreme Court recognizes the existence of a proportionality component in the Eighth Amendment, we perceive no difference between the protection afforded by that amendment and by the 25th Article of our Declaration of Rights.").

The Eighth Amendment requires States "to provide adequate medical care to incarcerated prisoners . . . . because the prisoner is unable by reason of the deprivation of his liberty [to] care for himself, it is only just that the State be required to care for him." *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 198–99 (1989) (internal citations and quotations omitted); *see also State v. Kanavy*, 416 Md. 1, 8 (2010) ("The due process clause of the Fourteenth Amendment requires the State to provide medical care to injured persons who are in the custody of State agents.").

The Eighth Amendment "imposes certain basic duties on prison officials" including "maintaining humane conditions of confinement, including the provision of adequate medical care." *Raynor v. Pugh*, 817 F.3d 123, 127 (4th Cir. 2016) (citing *Farmer v. Brennan,* 511 U.S. 825, 832 (1994)). It protects against future harm, including the danger of crowding prisoners into cells when some of them have infectious maladies even though the harm might not occur immediately and might not affect all those exposed. *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (citing *Hutto v. Finney,* 437 U.S. 678, 682 (1978)).

To "articulate a violation of the Eighth Amendment, an inmate must show both (1) a serious deprivation of a basic human need; and (2) deliberate indifference to prison conditions on the part of prison officials." *Campbell v. Cushwa*, 133 Md. App. 519, 548 (2000) (internal quotations omitted); *see Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (explaining the two-part test to find an Eighth Amendment violation).

The serious deprivation prong is an objective standard. The plaintiff must show "'a serious deprivation of his rights in the form of a serious or significant physical or emotional injury' or the substantial risk thereof" *Brown v. Dep't of Pub. Safety & Corr. Servs.*, 383 F. Supp. 3d 519, 545 (D. Md. 2019) (quoting *Danser v. Stansberry*, 772 F.3d 340, 346-47 (4th Cir. 2014)). A prisoner claiming a failure to protect (or failure to prevent harm) must show under this

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[2] These provisions similarly apply to those individuals who have been found or pled guilty but have not yet been sentenced. *See Bell v. Wolfish*, 441 U.S. 520, 535 (1979) ("For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."); *see also Ingraham v. Wright*, 430 U.S. 651, 671 (1977) ("[T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law.").

[3] Article 16 states: "That sanguinary Laws ought to be avoided as far as it is consistent with the safety of the State; and no Law to inflict cruel and unusual pains and penalties ought to be made in any case, or at any time, hereafter." Md. Const. Decl. of Rts. art. 16. Article 25 states: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted, by the Courts of Law." Md. Const. Decl. of Rts. art. 25.

first step that she was "incarcerated under conditions posing a substantial risk of serious harm." *Makdessi v. Fields*, 789 F.3d 126, 133 (4th Cir. 2015) (citing *Farmer,* 511 U.S. at 834).

An inmate satisfies the first step when he faces a risk "so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk." *Helling*, 509 U.S. at 36. In *Helling*, the Court allowed a claim to move forward that alleged involuntary exposure to secondhand smoke. *Id.* at 35-36. The Court gave examples of other conditions that would pose a substantial risk and would require a remedy: inmates crowded in cells where some had infectious maladies such as hepatitis and venereal disease; unsafe drinking water even when no one had yet contracted dysentery; and the exposure of inmates to a serious, communicable disease even when the complaining inmate had no serious current symptoms. *Id.* at 33. A prisoner need not have already suffered injury; he can show prison conditions are "so vile and pestilence plagued that injury is almost certain to manifest." *Brown*, 383 F. Supp. 3d at 45; *see also Webb v. Deboo*, 423 F. App'x 299, 301 (4th Cir. 2011) (finding a complaint alleging prison overcrowding and lack of sanitation sufficient to satisfy the serious deprivation test even when the prisoner himself showed no serious symptoms himself).

The deliberate indifference prong is a subjective standard; the plaintiff must show that the official "had actual knowledge of an excessive risk of serious harm, or that she was aware of facts from which she could draw the inference that a substantial risk of serious harm existed, and in fact did draw that inference." *Brown*, 383 F. Supp. 3d at 546. The plaintiff may satisfy this step by showing the risk of injury was so obvious that officials had to know because they could not have failed to know. *Id.* (citing *Brice v. Virginia Beach Corr. Ctr.*, 58 F.3d 101, 105 (4th Cir. 1995)). "The Defendants must have 'subjectively recognized' both that a 'substantial risk of harm existed' and that their actions were 'inappropriate in light of that risk.'" *Id.* (citing *Parrish ex rel. Lee v. Cleveland*, 372 F.3d 294, 303 (4th Cir. 2004)).

3. Fourteenth Amendment (Due Process) Also Applies to Convicted Persons

While the bulk of the argument on behalf of convicted persons will hinge on Eighth Amendment violations, individuals are also afforded Fourteenth Amendment protections while incarcerated. *See Bell v. Wolfish*, 441 U.S. 520, 545 (1979) (holding that prisoners are protected by the Due Process Clause against additional deprivation of life, liberty, or property without due process of law). Prisoners have a constitutionally protected liberty interest under the Due Process Clause to reasonably safe conditions of confinement. *See Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982); *see also Sanding v. Conner*, 515 U.S. 472, 484 (1995) (holding that incarcerated people have a constitutionally protected liberty interest in avoiding "atypical and significant hardship . . . in relation to the ordinary incidents of prison life.").

4. Fourteenth Amendment Provides Pretrial Detainees Protections at Least as Great as Eighth Amendment Protections

The Eighth Amendment does not explicitly apply to pretrial detainees because pretrial detainees, unlike convicted prisoners, are not being "punished." *See Kingsley v. Hendrickson*, 576 U.S. 389, 135 S.Ct. 2466, 2475 (2015) (holding that there is no need to determine whether punishment is unconstitutional in a case involving a pretrial detainee). A pretrial detainee, however, is afforded at least the same constitutional rights as a convicted prisoner pursuant to the Due Process Clause. *See City of Revere v. Mass. Gen. Hosp*., 463 U.S. 239, 244 (1983) (holding that the due process rights of a pretrial detainee are "at least as great as the Eighth Amendment protections available to a convicted prisoner"); *Bell v. Wolfish*, 441 U.S. 520, 545 (1979); *see also Graham v. Connor*, 490 U.S. 386, 395 at n.10 (1989) (noting that pretrial detainees have the same "substantive due process" protections that the Eighth Amendment provides to convicted prisoners). Therefore, the Fourteenth Amendment provides pretrial detainees all of the above Eighth Amendment protections that convicted prisoners are afforded. *See supra* part I.A.2.

5. Additional Due Process Protections Provided to Pretrial Detainees

Article 24 of the Maryland Constitution is the equivalent to the Due Process Clause of the Fourteenth Amendment of the United States Constitution.[4] The Maryland courts have generally interpreted the due process provision of the Maryland Declaration of Rights as synonymous with federal due process. *Branch v. McGeeney*, 123 Md. App. 330, 352 (1998); *Beeman v. Department of Health and Mental Hygiene*, 107 Md. App. 122, 141 (1995).

A pretrial detainee can prevail on a due process claim by providing objective evidence that the challenged governmental action is not rationally related to a legitimate governmental purpose or that it is excessive in relation to that purpose. *See Kingsley*, 135 S.Ct. at 2473-74; *United States v. Salerno*, 481 U.S. 739, 749-751 (1987) (holding that the government interest in pretrial detention must be sufficiently compelling). Further, Maryland specifically prioritizes pretrial release over detention, release on own recognizance over release with conditions, and non-financial conditions over financial conditions. *See Bradds v. Randolph*, 239 Md. App. 50, 53, 79 (2018) (explaining how the Maryland rules governing pretrial release were revised in 2017 to direct trial courts to only detain defendants who pose flight risks or who are dangerous, and to release everyone else subject to non-financial conditions, except as a last resort).

[4] Article 24 provides "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land."

6. Maryland Rules & the Eighth and Fourteenth Amendments Should Allow for Release During Pandemic

Pretrial detainees and convicted persons in custody during the COVID-19 pandemic clearly have a claim for violation of standards governing unconstitutional conditions of confinement. Prisons and jails are unable to meet basic social distancing and hygienic requirements that would prevent outbreaks of the deadly virus; therefore, pretrial detainees and convicted persons are suffering under conditions that unquestionably have a substantial risk of harm. The conditions during this crisis will inevitably cause serious harm to a significant number of those incarcerated. The substantial risk of COVID-19 is just as great, if not greater, than the risks the Court has deemed sufficient to raise constitutional concerns, including secondhand smoke.[5]

Officials have actual knowledge of that excessive risk of serious harm. Governor Larry Hogan declared a State of Emergency on March 5, 2020, in which he called COVID-19 "a viral agent capable of causing extensive loss of life or serious disability" and an "immediate danger to public safety."[6] On March 30, 2020, the Governor expanded the state's prohibition on large gatherings to a stricter Stay-at-Home order to "prevent the spread of COVID-19 within the State."[7] On April 3, 2020, Attorney General Brian Frosh wrote to the Governor that the state needs "a broader and faster release of a larger swath of inmates" and that "[s]uch action is necessary to stave off a catastrophe that will not only result in avoidable illness and death in the prisons."[8] On April 7, 2020, the ACLU filed a petition for extraordinary writ to compel the reduction of Maryland's prison population to prevent jails and prisons from becoming the epicenter of this crisis.[9] On April 10, 2020 the Baltimore Sun reported that COVID19 "continues to dominate the news cycle in Maryland."[10]

Furthermore, on April 18, 2020, Governor Hogan issued an order making it possible for some individuals serving prison sentences to be released or placed in home detention earlier that

[5] The Eighth Amendment does not have a quantifiable statistical risk standard; instead, a court assesses "whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk. In other words, the prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate." *Helling*, 509 U.S. at 36. Clearly, unwilling exposure to COVID-19 violates our society's standards of decency.

[6] https://governor.maryland.gov/wp-content/uploads/2020/03/Proclamation-COVID-19.pdf

[7] https://governor.maryland.gov/wp-content/uploads/2020/03/Gatherings-FOURTH-AMENDED-3.30.20.pdf

[8] https://www.marylandmatters.org/wp-content/uploads/2020/04/Governor-Hogan-Ltr-040320-re-COVID-19.pdf

[9] https://www.aclu-md.org/sites/default/files/field_documents/md_amended_petition_-_apr_8_2020_0.pdf*; see also* Amanda Klonsky, *An Epicenter of the Pandemic Will Be Jails and Prisons, if Inaction Continue*s, New York Times (Mar. 12, 2020), https://www.nytimes.com/2020/03/16/opinion/coronavirus-in-jails.html

[10] https://www.baltimoresun.com/coronavirus/bs-md-5-takeaways-coronavirus-in-maryland-week-20200410-ncazf2hwbjhehoukfd3t4czfky-story.html (explaining the state is dealing with a surge in inpatient critical care, researchers are predicting Maryland will become an emerging hotspot of the disease, and the State Superintendent is preparing parents that virtual schooling could extend through the fall and winter).

otherwise possible.[11] This order recognizes the unique public health concerns facing prisons: "Because of inmates' close proximity to each other, employees, and contractors in correctional facilities, the spread of COVID-19 there poses a significant threat to their health, welfare, and safety, as well as the communities in which they live or to which they will return."[12] In addition, the Maryland Department of Public Safety and Correctional Services is regularly reporting infection rates among inmates, corrections officers, and contractors.[13] As of April 21, it reported 152 known cases, which does not include contractors.[14]

The risk is alarmingly obvious and any action that is not working to reduce the jail and prison population is objectively inappropriate in light of that risk. Therefore, these conditions are a violation of the protections afforded convicted persons under the Eighth and Fourteenth Amendments and are also a violation of the Fourteenth Amendment as applied to pretrial detainees, as well as the Maryland state corollaries of both.

B. Writs of Mandamus

1. Summary

A writ of mandamus or prohibition is the legal mechanism that OPD and the ACLU used to address issues of detained juveniles and adults, respectively, before the Court of Appeals. Though the petitions were either denied or dismissed (according to the orders, this was in part due to the impending release of Administrative Orders from the Court of Appeals addressing detained juveniles and adults[15]), this could be an effective mechanism for addressing some of the more widespread issues that Covid-19 has created. Though writs of mandamus are often used to file an original action directly with the Court of Appeals, attorneys can also file them in Circuit Court or the Court of Special Appeals. *See*, *e.g.*, *Kerpelman v. Disability Review Bd. of Prince George's Cty. Police Pension Plan*, 843 A.2d 877, 879 (2004) (holding that Circuit Court improperly dismissed writ of mandamus). Often a writ of mandamus is seeking injunctive relief. The following information on filing and when to file a writ of mandamus can be read in tandem with the section on seeking injunctive relief, *see infra* Section I.C.

Under Md. Rule 15-701, an action for a writ of mandamus shall be commenced by the filing of a complaint, the form and contents of which shall comply with Md. Rules 2-303 through

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[11] https://governor.maryland.gov/wp-content/uploads/2020/04/Prisoner-Release-4.18.20.pdf
[12] Though this order makes it possible for some incarcerated individuals to be released, the order only applies to a limited subset of individuals.
[13] https://wtop.com/maryland/2020/04/state-prisons-release-new-covid-19-data-quietly-free-more-than-2000-inmates/
[14] *Id.*
[15] *See* https://www.courts.state.md.us/sites/default/files/admin-orders/20200414guidingresponseoftrialcourts.pdf (adults) and https://www.courts.state.md.us/sites/default/files/admin-orders/20200413guidingresponseofcircuitcourtssittingasjuvenilecourts.pdf (juveniles).

2-305.[16] Mandamus is a common law mechanism used for the special purpose indicated in the writ and depends upon the facts, circumstances, and conditions existing at the time the petition for mandamus is filed. *Town of District Heights v. County Comm'rs*, 122 A.2d 489 (1956). The writ of mandamus is an original action and not an appeal. *Philip Morris Inc. v. Angeletti*, 358 Md. 689, 708 (2000). Maryland Courts have stated that "[m]andamus ought to be used in all cases where the law has established no specific remedy, and where in justice and good government there ought to be one." *Harwood v. Marshall*, 9 Md. 83, 83 (1856). Furthermore, in cases of mandamus "where the urgency of establishing a rule of future conduct in matters of important public concern is imperative and manifest, a departure from the general rule and practice of not deciding academic questions may be justified." *Board of Educ. v. Montgomery County*, 237 Md. 191, 205 A.2d 202 (1964). Ordinarily, a writ of mandamus should issue only in those cases where another adequate remedy does not exist, and where "clear and undisputable rights are at stake." *Wilson v. Simms*, 380 Md. 206, 223 (2004). The Court of Appeals may utilize writs of mandamus and prohibition as an aid to appellate jurisdiction even when there is no appeal pending in court, and even when there is potentially eventual appellate review by appeal or certiorari. *Philip Morris Inc. v. Angeletti*, 358 Md. 689 (2000); *see also Wilson v. Simms* at 223.

2. Purpose of Mandamus and Exhaustion of Remedies

Courts view mandamus as an extraordinary remedy that they will not turn to unless there is no other adequate or convenient remedy and "clear and undisputable rights are at stake." *City of Seat Pleasant v. Jones*, 364 Md. 663, 673 (2001). It is reserved only for those instances where there is no other available procedure for obtaining review, or where action complained of is "arbitrary and capricious." *Goodwich v. Nolan*, 102 Md. App. 499, 506 (1994); *see also Josephson v. City of Annapolis*, 728 A.2d 690 (1998) (holding failure to exhaust available statutory remedies for administrative appeals and judicial review of city's rezoning precluded mandamus action). Writs of mandamus are used to prevent disorder, from a failure of justice, where the law has established no specific remedy, and where in justice and good government there ought to be one. *State v. Manck*, 385 Md. 581, 588 (2005); *see also Kerpelman v. Disability Review Bd. of Prince George's County Police Pension Plan,* 155 Md. App. 513 (2004*); Philip Morris Inc. v. Angeletti*, 358 Md. at 708 (stating that a writ of mandamus "is a summary remedy, for the want of a specific one, where there would otherwise be a failure of justice"). In some instances, the Court of Appeals may issue a prerogative writ if it believes the interests of justice require issuance in order to restrain a lower court from acting in excess of its jurisdiction,

[16] In addition to writs of mandamus referenced in Md. Rule 15-701, Md. Rules 7-401 through 7-403 discuss administrative writs of mandamus. These rules apply to writs of mandamus where a litigant is seeking review of an administrative agency decision where no other right to review of appeal is authorized under the law. Md. Rule 7-401. Many aspects of administrative writs of mandamus and other writs of mandamus (which are often used in aid of appellate jurisdiction) are similar. Further research is necessary, however, to fully understand the ways in which these filings are treated differently in the courts.

otherwise grossly exceeding its authority, or failing to act when it ought to act. *In re Petition for Writ of Prohibition*, 312 Md. 280 (1988).

3. When a Court Can Issue a Writ of Mandamus

A court of competent jurisdiction may issue a writ of mandamus in order to compel the performance of a duty. *Wilson v. Simms*, 380 Md. at 217. It is generally used to "compel inferior tribunals, public officials or administrative agencies to perform their function, or perform some particular duty imposed upon them which in its nature is imperative and to the performance of which duty the party applying for the writ has a clear legal right." *Harvey v. Marshall*, 158 Md. App. at 381 (citing *Criminal Injuries Compensation Bd. v. Gould*, 273 Md. 486, 514 (1975)). Courts exercise the power to issue a writ of mandamus with caution, and tread carefully to avoid interfering with legislative prerogative and administrative discretion. *Id.*

4. Important Maryland Mandamus Cases

In a 2007 case, *Forster v. Hargadon,* the Md. Court of Appeals noted that there had only ever been three previous cases where it had opined in any significant detail on the authority of the court to issue writs of mandamus or prohibition and the standards for determining when such writs might be issued. 398 Md. 298, 305 (2007).These three cases were *In re Petition for Writ of Prohibition*, *Philip Morris, Inc. v. Angeletti*, and *State v. Manck.*

In *In re Petition*, the State filed a petition for mandamus after a judge ordered a new trial following a guilty verdict in a criminal action, expressing the view that the verdict was unjust and against the weight of the evidence. 312 Md. 280 (1988). The State, arguing that the judge had no authority to grant a new trial on that ground, asked the Court of Appeals to issue a writ of mandamus or prohibition and vacate the order. In reviewing the petition, the court set out the framework of analysis for petitions for mandamus and "anchored the authority to issue such a writ in the preservation or aid of the Court's appellate jurisdiction." *Id.* The court then considered the circumstances under which writs of mandamus should issue. It noted that they were "extraordinary writs, to be issued with great caution." *Id.* Borrowing from the Supreme Court's notion that mandamus could but "hardly ever" should issue in situations like this, the court dismissed the petition.

In the second case, *Philip Morris, Inc. v. Angeletti*, the court did issue a writ of mandamus. 358 Md. 689 (2000). This case arose out of a comprehensive class action against the tobacco industry. After the Circuit Court for Baltimore City certified several classes and set forth a three-phase trial schedule, the defendants petitioned the court for a writ of mandamus or prohibition that would decertify the class *Id.* at 701-04. The defendants argued in the petition that the trial court "grossly abused its discretion in certifying the class action." *Id.* at 704. The Court issued the writ, reasoning that "[t]he litigation plan approved by the Circuit Court in this case necessarily involves the commitment of such an extraordinary amount of the judicial and other resources of the busiest trial court in the State that any subsequent appellate review of the lower court's Class Certification Order is rendered inadequate and ineffective." *Id.* at 714. The court also noted that given the procedural context of the case, the party seeking the extraordinary writ

must demonstrate a "paramount public policy interest sufficient to offset the strongly established preference for adherence to the final judgment rule." *Id.* at 713.

In the third case, *State v. Manck,* the petition for mandamus sought review of a trial court's order striking the State's notice of intention to seek the death penalty. 385 Md. 581, 586 (2005). The State could not appeal the trial court's ruling so it filed a petition for mandamus asking that the Court of Appeals direct the judge to vacate his order. *Id.* The Court of Appeals denied the writ on the ground that the State's use of writs of mandamus should not be "applied to interlocutory procedural orders in criminal cases that do not have the effect of a dismissal." *Id.* at 599. State filed writs of mandamus were only appropriate where the State "has been totally deprived of the right to initiate a prosecution or where the trial court exceeded its authority and denied the Government the proper results of a valid conviction." *Id.*

5. Potential Applications for Writs of Mandamus during COVID-19 Pandemic

Lawyers can seek relief using writs of mandamus that would address issues in the jails and prisons. The essential factors that make filing a writ of mandamus appropriate are where (1) the petitioner seeks to compel inferior tribunals, public officials or administrative agencies to perform their function or perform some function that has become imperative; (2) to prevent disorder or from a failure of justice; (3) clear rights are at stake; and (4) where the law has not established a specific remedy where justice and good government indicate there should be one. *See State v. Manck*, 385 Md. 581, 588 (2005); *City of Seat Pleasant v. Jones*, 364 Md. 663, 673 (2001). Because many courts and government agencies have failed to act in the face of the COVID-19 crisis, there is both disorder and a failure of justice in the jails and prisons, clear rights are at issue, and no specific or clear remedies exist where there should be some, a writ of mandamus is appropriate to address many of the COVID-19 related ills.

Given these standards, some potential applications of a writ of mandamus could be the following: (a) requesting that the 90-day limitation on filing motions to modify sentences be lifted or substantially extended during the pandemic (similar to the rule change request that OPD made to Judge Barbera); (b) requesting the appointment of inspectors or special masters to determine how the jails and prisons are treating and caring for inmates and staff, including those who have or are suspected to have COVID-19; (c) requiring that jails and prisons implement guidelines from the CDC and other public health officials that are necessary to halt the spread of the disease; (d) ordering jails and prisons to make it possible for attorneys to contact and speak with clients; and (e) preventing police from arresting people on certain warrants and/or giving summonses or citations for certain offenses rather than arresting and processing through the jails. Obviously this list is not exhaustive, but for each, there is a lower court or government agency that could be directed to take action, a risk or already existing disorder or injustice, and no other specific remedy available. Furthermore, many of the above examples implicate constitutional rights including, the Sixth, Eighth, and Fourteenth Amendments and their Maryland analogues. *See supra* Sections I.A.2. though I.A.5. for a discussion of these rights. Due to the urgency of many of these issues, an attorney seeking a writ of mandamus might also want to seek a temporary restraining order, *see infra* Section I.C.1., discussing temporary restraining orders and

injunctive relief in greater detail.

C. Injunctive Relief in Maryland

Litigants might seek injunctive relief in individual cases, but this is more likely a useful tool for a mass relief approach. There are various parties against whom incarcerated individuals might seek an injunction, including the Dept. of Corrections and those running local detention facilities. This might work best if a petition for temporary injunctive relief were combined with a class action alleging unconstitutional conditions of confinement, but it could also be a stand-alone suit for injunctive relief.

One creative approach could be to seek to enjoin law enforcement from making custodial arrests in certain categories of cases, on the theory that harm from such arrests outweighs any benefit. The same could be true for prosecutors' offices, seeing to enjoin them from filing charges on certain types of cases during the Covid-19 pandemic (with the ability to file later). Such approaches fit squarely into the stated purpose of injunctive relief in Maryland, as "a preventive and protective remedy, *aimed at future acts,* and is not intended to redress past wrongs." *El Bey v. Moorish Sci. Temple of Am., Inc.*, 362 Md. 339, 353 (2001) (internal quotations omitted). An injunction is a remedy that petitioners commonly seek when filing a writ of mandamus. *See supra* Section I.B. for discussion of writs of mandamus.

1. Maryland Rule 15-501 through -505 Govern Injunctive Relief

The Maryland Rules delineate injunctions as follows: an injunction, which is "an order mandating or prohibiting a specified act," a preliminary injunction, which is "an injunction granted after opportunity for a full adversary hearing on the propriety of its issuance but before a final determination of the merits of the action," and a temporary restraining order (TRO), which is "an injunction granted without opportunity for a full adversary hearing on the propriety of its issuance." Md. Rule 15-501(a)-(c).

The court may grant an injunction "at any stage of an action . . . upon the terms and conditions justice may require." Md. Rule 15-502(b). The court must provide on the record "[t]he reasons for issuance or denial of an injunction" and "[a]n order granting an injunction shall (1) be in writing (2) be specific in terms, and (3) describe in reasonable detail, and not by reference to the complaint or other document, the act sought to be mandated or prohibited." Md. Rule 15–502(e). A court "may not issue a preliminary injunction without notice to all parties and an opportunity for a full adversary hearing on the propriety of its issuance." Md. Rule 15–505(a).

A court may issue a TRO without a full adversary hearing, but only if "it clearly appears from specific facts shown by affidavit or other statement under oath that immediate, substantial, and irreparable harm will result to the person seeking the order before a full adversary hearing can be held on the propriety of a preliminary or final injunction." Md. Rule 15-504(a). For both TROs and preliminary injunctions, a bond must be filed, though the court may waive that requirement if "(1) the person is unable to provide surety or other security for the bond, (2) substantial injustice would result if an injunction did not issue, and (3) the case is one of extraordinary hardship." Md. Rule 15-503(a)-(c).

2. Case Law and Elements of Injunctive Relief, Applied to COVID-19 Pandemic

An injunction is "a writ framed according to the circumstances of the case commanding an act which the court regards as essential to justice, or restraining an act which it esteems contrary to equity and good conscience." *El Bey v. Moorish Sci. Temple of Am., Inc.*, 362 Md. 339, 353 (2001) (internal quotations omitted). It "is usually considered an extraordinary remedy and the grant or denial of an injunction ordinarily lies within the sound discretion of the trial court." *B & P Enterprises v. Overland Equip. Co.*, 133 Md. App. 583, 631 (2000) (internal citations and quotations omitted). COVID-19 raises clear issues of acts, such as overcrowding of jails and prisons or incarceration on relatively minor charges, which call for an extraordinary remedy. *Cf. Chesapeake Outdoor Enterprises, Inc. v. Mayor & City Council of Baltimore,* 89 Md. App. 54, 597 A.2d 503 (1991) (describing injunctive relief granted against outdoor advertiser for improper billboards).

When determining whether to grant a preliminary injunction, a court considers the following:

> (1) the likelihood that the plaintiff will succeed on the merits; (2) the balance of convenience determined by whether greater injury would be done to the defendant by granting the injunction than would result by its refusal; (3) whether the plaintiff will suffer irreparable injury unless the injunction is granted; and (4) the public interest.

State v. Falcon, 451 Md. 138, 157 (2017) (quoting *Schade v. Md. State Bd. of Elections*, 401 Md. 1, 36 (2007)). The burden is on the moving party to prove these four factors. *Schade*, 401 Md. at 36 (internal quotations omitted). For the first factor, the party has to establish a probability of prevailing on the merits, rather than the possibility of doing so. *Id.* The second factor does not require an injury "be beyond all possibility of compensation in damages," but rather "irreparable injury is suffered whenever monetary damages are difficult to ascertain or are otherwise inadequate." *El Bey*, 362 Md. at 355. Still, a court will not normally grant injunctive relief unless the injury will be "substantial." *Id.* The harm need not have already occurred. *Leatherbury v. Peters*, 24 Md. App. 410, 412 (1975) ("It is well-established that courts of equity may intervene to prohibit a threat of harm that has not yet occurred."). When public interests are involved, courts may "go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Space Aero Products Co., Inc. v. R.E. Darling Co., Inc.*, 238 Md. 93, 128, *cert. denied*, 382 U.S. 843 (1965).

The application of this four-prong test to some claims for release due to the Covid-19 pandemic appear strong. There are quite viable claims about the conditions of confinement in Maryland detention facilities and prisons under the Eighth and Fourteenth Amendment (and the Maryland Declaration of Rights corollaries). A state constitutional violation implicating public health can satisfy the preliminary injunction requirements. *Ehrlich v. Perez*, 394 Md. 691, 733

(2006). In *Ehrlich v. Perez*, permanent resident aliens alleged that Maryland's failure to provide appropriate medical assistance funds to them violated Article 24 of the Maryland Declaration of Rights, which guarantees due process. *Id.* at 696-98. A preliminary injunction ordering subsequent payments to the plaintiffs was proper, in part because the plaintiffs demonstrated that their ongoing medical needs and "inability to obtain alternative health care, without State assistance" would cause them "irreparable injury unless the requested preliminary injunction was issued." *Id.* at 732-33; *cf. Miller v. French*, 530 U.S. 327, 332 (2000) (explaining the disposition of a federal class action case that had ongoing injunctive relief to correct Eighth Amendment violations in prison).

Injunctive relief need not be tied to monetary damages and is available to prevent "irremediable damage . . . to the people of Maryland." *Anne Arundel Cty. v. Governor*, 45 Md. App. 435, 456 (1980). In *Anne Arundel County*, the State of Maryland sought temporary injunctive relief to stop the county from enforcing an ordinance that would have prevented the State from moving and storing large amounts of PCB, a toxic chemical compound, in the county. *Id.* at 452-454. The Court of Special Appeals found that the state demonstrated both a likelihood of success on the merits at trial, and "the possibility of the irremediable damage that could have resulted to the people of Maryland if the PCB had not been removed immediately from the Sharptown storage tanks to a place of relative safety." *Id.* at 456. With Covid-19, the failure to release incarcerated individuals who do not pose a significant risk to public safety—in the interest of both their own and families' health as well as the health of those working in jails and prisons and their families—raises the possibility of severe illness and death (irremediable damage). As discussed briefly above, there is also a likelihood of success on the merits of a conditions of confinement permanent injunction or other action.

A police union can have standing to sue for injunctive relief in response to the actions of public officials. *Fraternal Order of Police v. Montgomery Cty.*, 446 Md. 490, 506 (2016) (finding a police union has a "specialized interest . . . in assuring that the county government does not exceed its legitimate authority"). It is possible that individuals working in county and state facilities and their organizational counterparts might seek injunctive relief (see DC Correctional officer lawsuit about conditions at DC jail).

Note that lawsuits for injunctive relief in individual cases might run up against courts' reticence in using such relief in criminal proceedings. *See In re Criminal Investigation No. 13 in Circuit Court for Dorchester Cty.*, 82 Md. App. 609, 615 (1990) ("As a general rule . . . [a court] may not inject itself, as a monitor or censor, into the functioning of that executive branch during the course of an investigation."); *Vargas-Aguila v. State, Office of Chief Med. Exam'r*, 202 Md. App. 375, 383 n.10 (2011) (noting that "courts of equity were restrained from interfering with criminal prosecutions").

D. <u>Claims under the Maryland Post-Conviction Act</u> (Md. Crim. Pro. Ann. § 7-102)

1. Claims for Clients Within Ten Years of Sentence

The Maryland Post-Conviction Act ("the Act") is applicable to any person convicted in a Maryland state court who is either confined under a sentence of imprisonment or on parole or

probation. The Act is most relevant for prisoners who may be affected by the COVID-19 outbreak through § 7-102(a)(4), which provides that a convicted person may begin a proceeding under the title within the circuit court in which the conviction was issued through a claim that "the sentence is otherwise subject to collateral attack on a ground of alleged error that would otherwise be available under a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy." The Maryland Court of Appeals has explained that "[a] post-conviction proceeding, often called a 'collateral proceeding,' brought under the Act is not an appeal of the judgment; rather, it is a collateral attack designed to address alleged constitutional, jurisdictional, or other fundamental violations that occurred at trial." *Mosley v. State*, 378 Md. 548, 559–60, 836 A.2d 678, 684–85 (2003).

Section 7-102(b) further sets out two requirements to begin proceedings: "(1) the person seeks to set aside or correct the judgment or sentence; and (2) the alleged error has not been previously and finally litigated or waived in the proceeding resulting in the conviction or in any other proceeding that the person has taken to secure relief from the person's conviction." Since a claim relating to COVID-19 is unlikely to have been finally litigated, that bar to eligibility should not pose an obstacle to COVID claims about the conditions of confinement.

Individuals may only file one claim and have a right to counsel (through OPD's Post Conviction Defenders Division, if qualified) and one hearing under the Act, Md. Crim. Pro. Ann. §§ 7-103(a), 108. However, "[t]he court may reopen a postconviction proceeding that was previously concluded if the court determines that the action is in the interests of justice." Md. Crim. Pro. Ann. § 7-104.

Although Post-Conviction Act claims are most often brought to allege ineffective assistance of counsel, see *Mosley*, 378 Md. at 560, this would also be a proper avenue for a claim that conditions of confinement (given the COVID-19 pandemic) violate the 8th and 14th Amendments of the U.S. Constitution and Articles 24 and 25 of the Maryland Constitution. *See supra* Section I.A.2. through I.A.5.

2. Claims for Clients More than Ten Years after Imposition of Sentence

Under § 7-103(b), "[u]nless extraordinary cause is shown, a petition under this subtitle may not be filed more than 10 years after the sentence was imposed." However, the Legislative Notes to this section state that "the General Assembly may wish to clarify that in cases where a resentencing has been imposed, the 10-year filing period runs from the date of the resentencing."

There are two exceptions to the 10-year limitation. First, the client can claim extraordinary cause under 7-103(b); the COVID pandemic certainly seems to qualify. Second, "[i]n *State v. Williamson,* 408 Md. 269, 277, 969 A.2d 300, 305 (2009), [the Court of Appeals] concluded that the 10–year limitations period did not apply to an individual sentenced before the effective date of the statute—October 1, 1995." Lopez v. State, 433 Md. App. 652, 654 (2013) (holding that the doctrine of laches does not bar individuals from litigation post-conviction claims under the Act).

II. Administrative Remedies

The following is based on a review of the powers and/or authorities the Maryland Governor, Secretary of the Department of Corrections, Maryland Attorney General, and individual county Departments of Correction have with regards to releasing individuals in Maryland jails and prisons. The powers/actions are listed from the most likely to be effective to least likely to be effective.

Note: this section was written before Governor Hogan's most recent Order addressing Covid-19 in Maryland jails and prisons. As discussed in Part I.A.6 supra, that Order was limited in scope as to individuals included and as to potential avenues for relief discussed but it did address some of the powers/actions listed below.

A. Powers of the Maryland Governor with Respect to Release of Detainees and Sentenced Individuals in Detention Facilities and State Prisons

1. Governor's Powers under the Maryland Code's Public Safety Article, Title 14, "Emergency Management"

Md Code, Public Safety 14-107(d)(1) – State of Emergency - declaration by Governor - After declaring a state of emergency, the Governor, if the Governor finds it necessary in order to protect the public health, welfare, or safety, may:

(i) suspend the effect of any statute or rule or regulation of an agency of the State or a political subdivision;

(ii) *direct and compel the evacuation of all or part of the population from a stricken or threatened area in the State;*

Argument: under subsections (i) and (ii) the Governor has broad power to suspend statutes and rules governing criminal cases, including those that determine sentences. The Governor also has power to evacuate some or all individuals in some or all jails and prisons by deeming the locations a threatened area due to the high risk to exposure of Covid-19.

MD Code, Public Safety 14-106(c)(1) – Emergency Management Powers of Governor; Harmful Consequences of Potential Emergencies.

In addition to emergency prevention measures included in the State, local, and interjurisdictional emergency plans [see other sections of Title 14]*, the Governor shall consider, on a continuing basis, steps that could be taken to prevent or reduce the harmful consequences of potential emergencies.*

Argument: The Governor can reduce harmful consequences of the spread of Covid-19 by releasing certain individuals being held in detention facilities and state prisons. Now that it is clear that there are cases of Covid-19 in the Maryland prison and jail systems, the Governor should take steps to ensure the safety of the inmates and corrections staff by recognizing the prisons' and jails' inability to prevent the spread of the virus internally as well as externally through the workers and thus release some of those held.

MD Code, Public Safety 14-3A-03 – Governor's Orders

> *(b) (3) If medically necessary and reasonable to treat, prevent, or reduce the spread of the disease or outbreak believed to have been caused by the exposure to a deadly agent, the Governor may order the Secretary [of Health]or other designated official to: . . .*
>
> *(iv) require individuals to go to and remain in places of isolation or quarantine until the Secretary or other designated official determines that the individuals no longer pose a substantial risk of transmitting the disease or condition to the public.*
>
> . . .
>
> *(d)(1) The Governor may order the evacuation, closing, or decontamination of any facility.*
>
> *(2) If necessary and reasonable to save lives or prevent exposure to a deadly agent, the Governor may order individuals to remain indoors or refrain from congregating.*

Argument: Under (b)(3)(iv), the Governor should order officials to require some individuals in jails and prisons to isolate or quarantine at home until there is no more risk. Under (d), the Governor should order the closing (hardest argument) and/or partial evacuation of some prisons and jails as it is necessary to save the lives of all of those exposed in prisons and jails who are unable to adequately protect themselves based on the prisons and jail conditions. Due to the high numbers of those incarcerated, the detained individuals cannot place at least six feet between themselves and others. The prisons and jails likely lack sufficient resources such as masks, soap, and adequate access to water for handwashing. The Governor will save the lives of at risk incarcerated individuals as well as those working in the prisons and jails and all people the workers encounter outside of the prisons and jails.

2. Governor's Powers and the Parole Commission

Argument: The Governor should issue an executive order to the MD Parole Commission to expedite and expand release opportunities for those whose sentence will soon expire, those serving short sentences, and those at risk for serious illness. There are a variety of avenues for such release under Title 7 of the MD Code, Correctional Services article. For example, for

certain individuals incarcerated for a variety of drug, theft, and fraud convictions who have already served one-fourth of their sentence, the MD. Parole Commission can expedite administrative releases per *Md. Code Ann., Corr. Servs. § 7- 301.1.*

3. Pardon/Commutation Power

MD Correctional Services § 7-601 – Power of Governor

(a) On giving the notice required by the Maryland Constitution, the Governor may:

(1) change a sentence of death into a sentence of life without the possibility of parole;

(2) pardon an individual convicted of a crime subject to any conditions the Governor requires; or

(3) remit any part of a sentence of imprisonment subject to any conditions the Governor requires, without the remission operating as a full pardon.

(b)(1) A pardon or commutation of sentence shall be evidenced by a written executive order signed by the Governor under the great seal.

(2) An order granting a pardon or conditional pardon shall clearly indicate on its face whether it is a partial or full pardon.

MD Correctional Services § 7-101 – Definitions . . .
d) "Commutation of sentence" means an act of clemency in which the Governor, by order, substitutes a lesser penalty for the grantee's offense for the penalty imposed by the court in which the grantee was convicted.
(e) "Conditional commutation of sentence" means a commutation of sentence that is dependent on compliance with conditions precedent or subsequent that the Governor specifies . . .
(f) "Conditional pardon" means a pardon that is dependent on compliance with conditions precedent or subsequent that the Governor specifies in the written order granting the pardon . . .
(h) "Pardon" means an act of clemency in which the Governor, by order, absolves the grantee from the guilty of the grantee's criminal acts and exempts the grantee from any penalties imposed by law for those criminal acts.

Note: University of Maryland law clinic working on this, so no analysis added.

B. Powers of the Department of Corrections with Respect to Release of Detainees and Sentenced Individuals in Detention Facilities and State Prisons

It appears that few governors have taken immediate action regarding release of those incarcerated. Those that have as of April 7, 2020 include the Governors of New York, Colorado, Kentucky, Illinois, Ohio, and New Mexico, often via executive order that calls for Department of Corrections action, expanded discretion, and sometimes suspension or amendment of existing

rules and statutes. For example, Colorado Governor Jared Polis issued an Executive Order "Temporarily Suspending Certain Regulatory Statutes Concerning Criminal Justice," and calling for the CO Dept. of Corrections to exercise discretion to release prisoners now eligible due to those suspensions.

MD Corr. Services Title 2 Department of Public Safety and Correctional Services § 2-102 – Secretary

> *(a)(1) With the advice and consent of the Senate, the Governor shall appoint the Secretary of Public Safety and Correctional Services.*
> *(2) The Secretary is the head of the Department.*
> *(b) Before taking office, the appointee shall take the oath required by Article I, § 9 of the Maryland Constitution.*
> *(c)(1) The Secretary serves at the pleasure of the Governor and is responsible directly to the Governor.*
> *(2) The Secretary shall advise the Governor on all matters assigned to the Department and is responsible for carrying out the Governor's policies on public safety, crime prevention, correction, parole, and probation.*

MD Corr. Services Title 2 Department of Public Safety and Correctional Services § 2-103 – Administration of Department

> *(a) The Secretary is responsible for the operation of the Department and shall establish guidelines and procedures to promote the orderly and efficient administration of the Department.*
> *(b) The Secretary may establish, reorganize, or abolish areas of responsibility in the office of the Secretary as necessary to fulfill effectively the duties assigned to the Secretary.*

Argument: 2-102 and 2-103 combined seem to imply that Governor Hogan could take similar measures as the CO Governor did in issuing an executive order granting the Secretary of Corrections broad authority to release people early (although a closer look comparing the two states might be necessary). The Governor and Secretary can work together to establish guidelines to follow in determining who to release early.

MD Corr. Services Title 8 State and Local Correctional System – Generally § 8-115 – Life Threatening or Health-Endangering Conditions

> *(a) If the [Maryland] Commission [on Correctional Standards] or an authorized inspector finds a condition in a correctional facility that is life threatening or health endangering, the Commission or inspector may order the immediate cessation of operation.*

(b) Within 96 hours after an order is issued under subsection (a) of this section, the Commission shall hold a review hearing to confirm or countermand the order.
(c)(1) If a correctional facility is ordered closed under this section, all inmates in the facility shall be transferred to and accepted in a suitable place of detention, as the Secretary determines.

Argument: Covid-19 is both life threatening and health endangering. Therefore, the jails and prisons in Maryland that have cases of Covid-19 in their facilities could be ordered to close. While some detained individuals might be moved to other facilities, another option is that release on GPS or another electronic monitoring system is a "suitable place of detention" for some individuals.

MD Corr. Services Title 2 Department of Public Safety and Correctional Services § 2-118 – Fee for Medical Services to Inmate

(b)(2): Secretary (of Public Safety and Correctional Services), Secretary Robert Green, may not assess a fee for health care services that are:
(v) required for necessary treatment.

Argument: If those infected by Covid-19 are going to continue to be held in the jails and prisons, especially those serving sentences or awaiting pretrial for violent crimes, the fee to go to the medical unit should be waived as treatment for Covid-19 is arguably required. Note: seems that MD may have waived this fee?

MD Corr. Services Title 9 State and Local Correctional System Inmates § 9-602 – Sick Inmates

a) Whenever the Division of Correction determines that an inmate in a correctional facility in the Division is ill and the facilities of the correctional facility are inadequate to provide treatment for the illness, the Division may direct the managing official of the correctional facility to order the temporary removal of the inmate from the correctional facility to a facility in the State in which the inmate may receive adequate treatment.
(b) The Division of Correction may direct the temporary removal of an inmate from a correctional facility under subsection (a) of this section for a specified or unspecified time period

Argument: This could be used to argue that any sick inmates must be moved to a state hospital for adequate treatment. Indeed, under Eighth/Fourteenth Amendment conditions of confinement cases relating to health and safety in jails and prisons (see *Helling*), such action to ensure adequate medical treatment would be mandatory.

C. Powers of the MD AG with Respect to Release of Detainees and Sentenced Individuals in Detention Facilities and State Prisons

Policy Perspective: The AG serves on the State Commission on Criminal Sentencing Policy, the Council for the Procurement of Health, Educational and Social Services. In addition, the AG's Office runs the **Juvenile Justice Monitoring Unit**.

Argument: This unit is meant to investigate the needs of the children under the jurisdiction of DJS and determine whether needs are being met. Further, it includes reporting on allegations of abuse and on treatment of and service for youth in the facilities. If youth are being kept in these facilities during the Covid-19 outbreak, services to protect their wellbeing and health are not being met. OPD filed lawsuit already re juveniles.

The AG's Office is also focused on **Protecting Senior Citizens**. One of the biggest initiatives on the AG's website is where he acknowledges that individuals over the age of 65 are the largest population in the United States and a "vulnerable" population. Appeal to the AG's work in protecting the senior citizens in Maryland by reminding him that the biggest threat to this population at present is not financial vulnerability -- but their health. The AG wrote a letter to Gov. Hogan on 4/3/20 and flagged this issue.

AG Rendering an Opinion: The Maryland Constitution directs that the Attorney General is to give an "opinion in writing whenever required by the General Assembly or either branch thereof, the Governor, the Comptroller, the Treasurer or any State's Attorney on any legal matter or subject." Md. Const. art. V, §3. Because the list does not include private citizens, they cannot request an opinion from the AG. However, an SA or other listed entity could request an opinion from the AG regarding the release of certain groups of individuals incarcerated (e.g. for due process and Eighth Amendment conditions of confinement violations). *Md Code State Govt Article, Title 6* deals with "Attorney General," but does not appear to have relevant authority relating to rendering an opinion.

D. Maryland Jails and Prisons are Likely Not in Compliance with Governor Hogan's Executive Orders

The Maryland Governor's Existing "Essential Businesses and other Establishments" Order makes clear that federal, state, or local government buildings and facilities are not required to close. However, under the section titled "Government buildings and Facilities with Large Occupancy or Attendance," the "State and local government buildings and facilities with an expected occupancy or attendance of more than ten persons shall . . . provide all occupants and attendees with the capability to wash their hands." Exec. Order at 5. It also requires that those

buildings and facilities post copies of the Maryland Department of Health recommendations for social distancing. Some of those recommendations include avoiding contact with sick people and practicing social distancing by keeping distance between yourself and others and avoiding crowds. Clearly, it is challenging to impossible to implement these parts of the Order in jails and prisons. The overall approach of the Executive Order is to save lives. That approach should apply equally to those held and working in jails and prisons.

E. Release through Maryland County Run Detention Centers and Rules for Detainee Release

MD Correctional Services Article, Title 8-115 Life-Threatening or Health-Endangering Conditions allows the Commission or inspector to order the immediate cessation of operation if there exists life-threatening or health-endangering conditions. However, if the correctional facility is ordered to close under this section, all of the inmates in the facility will be transferred to and accepted in a suitable place of detention determined by the Secretary. This section establishes a means to transfer inmates to other detention facilities but not necessarily a means to release inmates from the facilities into the community.

Overall, it appears that the leading authority that county run detention centers have lies largely in *MD Correctional Services Article, Title 11, Subtitle 7 Individual County Provisions.* Title 11 governs local correctional facilities in Maryland. Specifically, Subtitle 7 provides for individual county provisions and the powers pertaining to the county detention center(s). In regards to release powers, it seems that most counties allow for a pretrial release program and/or a home detention program which may be the most effective method of release. Subtitle 7 provides home detention programs for the following counties: Baltimore, Anne Arundel, Howard, Harford, Calvert, Allegany, and Garrett. The following counties allow for home detention programs, as well as pretrial release programs pending certain conditions: Frederick, Carroll, Washington, St. Mary's, Cecil, Wicomico, Dorchester, Garrett, and Kent. Calvert County only allows for pretrial release programs. The following counties do not mention any type of home detention or pretrial release under Subtitle 7: Prince George, Montgomery, Caroline, Queen Anne, Worcester, Charles, and Talbot. Lastly, Somerset County was the only county that was not included in Subtitle 7.

Detainees have to qualify for the home detention programs based mostly on the types of crimes; however, those serving time for violent crimes usually do not qualify. Moreover, in most counties, if the administrator, sheriff, department, etc. recommends participation in a home detention program, the court can then authorize it at any time during the individual's confinement. Most counties also state that if the individual violates "a condition or provision of trust," the individual will no longer qualify for the program; however, there is no clear explanation on what "a condition or provision of trust" means.

For the above-referenced counties that were not included in Subtitle 7or did not have information regarding release under Subtitle 7, we looked at the county websites. The only

county website with relevant information regarding release was Prince George (*see relevant portion below*).

Prince George County's Corrections website, specifically the section titled "Inmate Release & Records," states:
This Section is comprised of the Inmate Records Unit, Release Unit, Diminution Coordinator, and Expedited Court. These units are tasked with the following:

- Inmate Records Unit: Maintain a case file and computerized record on each inmate from time of intake to release, and interpret official court documents.
- **Inmate Release Unit: Coordinate the appropriate release of detained individuals.**
- Diminution Coordinator: Reviewing files of sentenced inmates, projecting release dates,
- Recalculating diminution credits for good conduct or program participation.
- **Expedited Court Process: Expedite the dispositions of cases of individuals confined on non-violent offenses or nuisance.**