

March 25, 2020

The Honorable Pete Ricketts
Office of the Governor
P.O. Box 94848
Lincoln, NE 68509-4848



The Governor, Attorney General and Secretary of State, sitting as a board, shall have power to ... grant respites, reprieves, pardons, or commutations in all cases of conviction for offenses against the laws of the state, except treason and cases of impeachment.

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Governor Ricketts:

We are writing to thank you for your leadership addressing the unprecedented COVID-19 outbreak and to offer my team's help in any way we can provide. It is clear we are in uncharted territory. This virus has upended all Nebraskans' daily lives in unexpected and profound ways. It has also introduced new challenges into the already complicated logistics of our criminal justice system, governmental proceedings, and the upcoming elections. As the virus spreads, it will become increasingly important that response plans protect the health, safety, and civil liberties of all who call Nebraska home. I know working together we can strike the right balance.

If you need a thought partner or formal legal research as you consider solutions, we are here. We want to help. We know you are working to protect Nebraskans' rights and to appropriately center community public health. We have capacity to share best practices from neighboring states, identify experts, use our social media platforms to share information, and conduct legal and policy research. This letter will not make poorly conceived demands for a wholesale release of inmates in response to the COVID-19 health crisis. Nor will it command specific actions by Director Frakes in response to the emergency. We assume that, with the help of your staff, you are carefully thinking through all of the legal and humanitarian concerns and striving to simply do what is right with respect to incarcerated Nebraskans whose vulnerability to COVID-19 is magnified at overcrowded, overburdened corrections facilities. We ask only that you consider the following points and to thereafter commute the sentences of vulnerable inmates housed in Department of Corrections facilities.



The Eighth Amendment Requires Humane Conditions of Confinement

The fact that a person has been convicted of a crime does not authorize the state to deprive him of those rights which the law still recognizes, nor treat him as having no rights.¹

The United States Supreme Court has established that, "When the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. . . . The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs -- *e. g.*, food, clothing, shelter, medical care, and reasonable safety -- it transgresses the substantive limits on state action set by the Eighth Amendment. . . ."²

The Eighth Amendment's prohibition against "cruel and unusual punishments" under the federal Constitution requires that prison officials provide "humane" conditions of confinement. "Prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.'"³ To avoid liability, the law requires abatement of conditions posing a "substantial risk of serious harm" to inmates. The Constitution of Nebraska, through Article I Section 9, requires at least as much protection.⁴

This is not a "do the best you can during a health crisis" standard. As the United States Supreme Court pointed out in *Farmer v. Brennan*, corrections officials have a duty to protect inmates from communicable and infectious disease.⁵ There can be no doubt that when COVID-19 inevitably finds its way into corrections facilities it will present a substantial risk of serious harm legally requiring drastic, preventative measures in accordance with the Eighth Amendment. Indeed, the moment an infected inmate is mingled with other

¹ *Ford v. State*, 71 Neb. 246, 1904 Neb. LEXIS 33 (Neb. 1904).

² *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 199-200, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989).

³ *Collins v. Frakes*, 2019 U.S. Dist. LEXIS 20067, *12 (2019) (Kopf, J.; quoting, *Farmer v. Brennan*, 511 U.S. 825, 832 (1994)).

⁴ See, *State v. Mata*, 275 Neb. 1 (2008).

⁵ *Helling v. McKinney*, 509 U.S. 25, 27 (1993); *Hutto v. Finney*, 437 U.S. 678, 682, 98 S. Ct. 2565 (1978) (Eighth Amendment required a remedy to protect inmates from infectious maladies, even though it was not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed).



inmates in a Nebraska correctional facility, an Eighth Amendment violation will have occurred.

Legally, Governor Ricketts, this is an easy call.

Inaction Is Not Just, Justice Requires Action

Nor would commutation of selected sentences work an injustice. No Nebraska judge would deliberately sentence a non-violent, or low-level, or vulnerable defendant to endure the risk presented by an overcrowded facility ravaged by COVID-19. Likely, none have.

Imprisonment under these circumstances is not necessary to do justice. Rather, action by the Board of Pardons is necessary to avoid injustice. Consider, for example, the hundreds of people who are already eligible for parole but remain imprisoned for the purpose of chemical dependency or other correctional treatment the Department cannot currently provide, either due to the lack of resources or the public health emergency. Prolonging their confinement, under these conditions, for those reasons, would not be just. It would be cruelly irresponsible.

The Experience in Other States Proves the Likely Need for Commutations

In New York, inmates in both federal and state facilities have tested positive, including 38 (at last count) at Riker's Island. News sources report that nine advocacy groups, from both sides of the political spectrum, have urged in a letter to President Trump to use his clemency power to commute the federal sentences of people eligible for compassionate release and other inmates at high-risk from the virus.⁶ Further, with the consent of the New Jersey Attorney General and the County Prosecutor's Association, New Jersey is moving toward release of up to 1,000 inmates. Similarly, New York City has flagged hundreds for release.

Affording Relief is Consistent with Public Policy

Section 81-1,110.02 allows for medical parole for inmates "who because of an existing medical or physical condition is determined by the department to be terminally ill or permanently incapacitated." This provision is a straightforward expression of Nebraskans to recognize the importance of treating one another humanely. We do not unnecessarily leave people to die in prison unless they were given a life sentence. Commuting sentences for vulnerable inmates would be an act of

⁶ <https://www.npr.org/sections/coronavirus-live-updates/2020/03/24/820618140/as-covid-19-spreads-calls-grow-to-protect-inmates-in-federal-prisons>



leadership consistent with our public policy and humane principles at their core.

Commutation of Selected Sentences is Feasible

Action could be taken, starting now, to identify the class of vulnerable inmates whose files should be reviewed for commutation. Dr. Gary Anthonie, in his capacity as Chief Medical Officer, along with DCS health officials, can be relied upon to identify the most vulnerable inmates, including the elderly and those with relevant preexisting medical conditions, such as HIV. These Nebraska citizens could be granted parole or their sentences commuted to a term equaling that already served.

These inmates will not escape justice; they've been arrested, convicted, sentenced, imprisoned, stripped of their civil rights and, in most cases, will return to the hard challenges being faced by the poor and disadvantaged as a result of COVID-19's effect on the economy. Undoubtedly, some will find their way into treatment programs or support groups unavailable at NDCS.

There are No Viable Alternatives

There appears to be little choice. The fact is inaction will spawn litigation on behalf of those who ultimately die or severely suffer from COVID-19. Due to the overcrowding, prison officials have no means of quarantining affected inmates from others. Cells designed for solitary confinement are already being (improperly) used to stem the overcrowding crisis.

Perhaps NDCS could commandeer hotel or other space to quarantine contagious inmates. However, most reasonable people would question the wisdom of incurring the associated expense rather than employing it toward other public health emergency purposes.

Call to Lead

We believe Nebraskans are compassionate and sympathetic and would support actions to protect their friends, relatives, neighbors and fellow Nebraskans who are incarcerated. Certainly, we are convinced that Nebraska's district judges would decline to impose a sentence of imprisonment for many, most, or all the non-violent, vulnerable inmates that could be spared the unnecessary, foreseeable, severe harm currently headed their way. It is not just ACLU Nebraska. Countless Nebraskans are counting on you to lead.

I have enclosed a model Executive Order as a starting point. Please reach out at any time if we can help in any other way. One of the

things We love most about our beautiful state is that Nebraskans together when times get tough and we help our neighbors. Times are tough and the ACLU of Nebraska is ready to roll up our sleeves and lend a helping hand.

Respectfully,



Danielle Conrad
Executive Director

Respectfully,



Adam J. Sipple
Legal Director



C: **Bob Evnen**
Secretary of State

Douglas Petersen
Nebraska Attorney General

Ryan Post
Assistant Attorney General

Director Scott Frakes
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Honorable Thomas Otepka
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