

# Lawyers Committee for Children's Rights

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April 7<sup>th</sup>, 2020

***VIA ELECTRONIC and U.S. MAIL***

Chief Justice Donald W. Beatty  
S.C. Supreme Court  
1231 Gervais Street  
Columbia, SC 29201

***RE: State Juvenile Justice Response to COVID 19 Crisis***

Dear Mr. Chief Justice:

As our judicial system addresses the significant challenges of functioning in this crisis, there are children hidden from view whose fate may depend on how we respond to them.

By now you will have received correspondence from several organizations calling attention to children and youth incarcerated in our state's juvenile justice system, urging limits to detention and confinement to mitigate the effects of COVID 19. We write to offer some specific suggestions for implementing these reforms.

## ***Police Response***

Clearly the first contact a youngster has with the prospect of confinement is almost always the police response. In former times, law enforcement officers believed – rightfully – that they had discretion to caution children guilty of minor misconduct without the necessity of arrest. Perhaps because the juvenile justice system became more formal, law enforcement relied less on this method of policing youthful misbehavior in favor of formal arrests and petitions to family court. Coupled with recent legislation to raise the age of juvenile court jurisdiction, the COVID 19 epidemic should reinforce the authority of the state's law enforcement officers to warn or caution youngsters engaging in minor, delinquent misconduct short of arresting them.<sup>i</sup>

Furthermore, even in cases which merit apprehension, South Carolina's statutes promote the release of a youth to parents. See, S.C. Code Ann. Section 63-19-810(A) (Supp. 2008). The statute recognizes that release to parent surrogates is also permissible, including "a responsible adult, a responsible agent of a court-approved foster home, group home, non-secure facility or program..." so long as that person executes a written promise to return the child for court proceedings. In the midst of this crisis, this release must be presumptive.

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The provisions of the same statute provide another opportunity for release. S.C. Code Ann. Section 63-19-810(B) sets out a mechanism for release in the wake of a police decision to apprehend. The arresting officer must confer with an agent of the S.C. Department of Juvenile Justice to determine whether the child requires detention, or instead whether the youngster can be released to a parent or other responsible adult. (A youth charged with a defined violent offense may only be released by law enforcement pending trial.) A reminder from this Court that the statute requires this consultation would doubtless be helpful in limiting juvenile detentions upon arrest. And it is noteworthy that these are typically warrantless arrests, which this Court's order explicitly addresses in the adult setting, at Section (c)(5).

## ***Solicitors' Response***

The circuit solicitors' offices have a very prominent role to play in diverting youth from detention.

To begin with, the state's prosecutors act as gatekeepers in decisions governing detention and confinement of offenders through recommendations on these decisions, and these recommendations are usually accorded great weight by the courts. Prosecutors in juvenile court are no different. The juvenile prosecutor is a critical principal in juvenile detention hearings and they should be encouraged to recommend release rather than detention.

Moreover, the juvenile prosecutor should exercise authority to review the sufficiency of the facts and elements of the offense in the charging petition to determine whether the case against the youngster can lawfully proceed. Often, juvenile petitions are authored by the arresting officer, without the oversight of a magistrate. When those petitions are facially deficient, solicitors should be encouraged to dismiss them.

## ***Detention Centers Response.***

The Department of Juvenile Justice operates a statewide detention center in Columbia which serves most of the counties. There are also three juvenile detention centers in the state's three metropolitan areas of Greenville, Richland and Charleston counties.

It is important to note that, if the department's experience is any guide to the offenses triggering detention, those offenses are low level indeed. In 2017, the department reports that of the top five offenses accounting for detention, only one, 1<sup>st</sup> degree burglary, was considered a violent offense under state law. An astounding 67% were classified by the department as either "all other" reasons or administrative reasons, suggesting many such detentions were unnecessary.<sup>ii</sup>

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None of these centers is designed or equipped to provide for adequate separation of youth to mitigate viral risk, any more than their adult counterparts. There are currently about 70 in the statewide detention center operated by the Department. The center's staff should be authorized to identify candidates who may safely be released pending further proceedings in the family courts, and then notify the relevant family court of the prospects of the youngster for release.<sup>iii</sup> Upon receipt, the court could notify the prosecutor, the defense attorney and staff at the local SCDJJ office of the communication. The court could then convene a hearing on whether release should occur pending adjudication of the youth, and those hearings could occur consistent with the provisions of your court's trial court directive issued April 3<sup>rd</sup>, 2020, at Section (C)(2) & (3).<sup>iv</sup> Preferably, release should be accomplished by consent order.

The family courts retain the authority to insist upon certain conditions for release, and the court should impose any set of conditions which would protect the public safety and secure the return of the youngster to judicial proceedings if released. And release should be presumptive.

Likewise, SCDJJ staff in the three counties operating juvenile detention centers should also be authorized to screen candidates for release. There are currently 19 children in the Greenville center, 26 in the Charleston center, and three at the Richland site (though some of the youth who were detained there previously may have been transferred to the state DJJ facility). The staff should be authorized to communicate with the appropriate family court judges, who would then proceed in the same fashion to consider a release decision.

## ***Family Court Response***

Detention decisions made by family court judges are governed by S.C. Code Ann. Section 63-19-820(B) (Supp. 2008). The criteria for determining whether a youngster is eligible for detention are fairly specific, and as the statute makes clear, mere eligibility for detention does not mandate incarceration. Instead, it is easily inferable from the statute that there is a presumption in favor of release. Guidance from this Court making this clear for the family courts would be highly effective.

Presiding at disposition in delinquency proceedings, the family courts often rely upon the state's three regional evaluation centers operated by the Department of Juvenile Justice as a prelude to final disposition. These evaluations are governed by S.C. Code Ann. Section 63-19-1440(C) (Supp. 2009). Those evaluations may occur in the child's community, rather than in a confined setting. It has been argued that the "vast majority" of evaluations should occur in the community, and youth adjudicated for all but the most serious misdemeanors should be prohibited from placement there.<sup>v</sup>

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In light of the crisis posed by COVID 19, a directive from this Court requiring that all but those children adjudicated for the most serious offenses should be evaluated in their communities.

Currently there are 33 youth at the Upstate evaluation center in Union, S.C., 34 youth in the Midlands center in Richland County and 24 at the Coastal center in Ridgeville, South Carolina. It is highly doubtful that most of these youth need to be there given the present crisis. Similar to the characteristics of youth admitted to the DJJ detention center, most of these offenses are non-violent, ranging from simple assault, to larceny and non-violent burglaries. A great number of these admissions are for probation violations, and notably, in the Upstate center, possession of marijuana.<sup>vi</sup> As with the populations detained in pretrial proceedings, DJJ staff at the regional centers should be authorized to identify those youth who are good candidates for release and communicate those cases to the committing family court judge for a plenary review and potential release. And the principals in those proceedings should be encouraged to enter consent orders to that end.

As for youth committed to the long-term institutions, all of them operated by the Department of Juvenile Justice on Broad River Road in Columbia, there are 120 incarcerated at that site.<sup>vii</sup> The department reports that in 2017, the latest year for which data is available, the vast majority of commitments were for probation violations, contempt of court, or simple assault.<sup>viii</sup> Clearly many of these youth can safely be released without compromising public safety, whereas their further confinement can only potentiate the prospect of a COVID 19 epidemic there.<sup>ix</sup>

The department is authorized to release youth adjudicated for misdemeanors or status offenses without further hearing or parole proceedings. See, S.C. Code Ann. Section 63-19-1810(A)(1) (Supp. 2008). But those youth committed for probation violations or contempt of court will require release only by order of the committing family court. This includes youth who were committed to a determinate sentence of up to 90 days under S.C. Code Ann. Section 63-19-1440(B) (Supp. 2008).

As with the other populations confined at DJJ, staff there should be permitted to identify each and every youngster at the Broad River Road complex in categories such as these which merit release yet requiring a court order to do so, to notify the committing court of the youth's potential for release. Upon notification, as before, the family court should convene a plenary hearing, whether remotely or otherwise, to consider the child's release.

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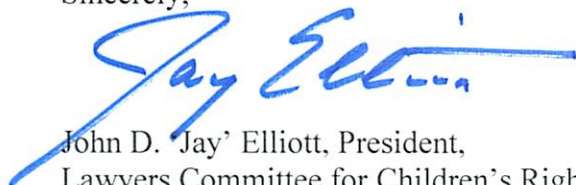
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The director of the Department of Juvenile Justice, Freddy Pough, has already called upon law enforcement, solicitors and public defenders, and family court judges for assistance in meeting this crisis, which some have deemed a "war" on the disease. In a March 17, 2020 letter to these groups, Mr. Pough called on them for assistance in limiting youth to be confined at the department to those who present a current, serious risk to public safety.<sup>x</sup> In order to marshal these allies, the director will clearly need the assistance of the courts in combatting the virus.

These are perilous times, and your court has exercised great leadership to ensure our state's courts continue to function as the third, essential branch while meeting the challenge of this pandemic. We offer these suggestions for your consideration to assist in continuing that leadership. We understand that the Court must rely on other agencies as well to implement the recommendations outlined here, and they will be communicated to the Governor and the director of the Department of Juvenile Justice.

Thank you in advance for giving serious consideration to these recommendations.

Sincerely,



John D. Jay' Elliott, President,  
Lawyers Committee for Children's Rights

ENCLOSURE

CC: HON. HENRY DARGAN MCMASTER,  
DIRECTOR FREDDIE B. POUGH

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<sup>i</sup> This approach was recommended as long ago as 1980 with the adoption of the IJA/ABA Juvenile Justice Standards relating to Police Handling of Juvenile Problems and remains persuasive to this day. See IJA/ABA Standard 2.4 of the relevant volume, available at [https://www.americanbar.org/groups/criminal\\_justice/standards/JuvenileJusticeStandards/](https://www.americanbar.org/groups/criminal_justice/standards/JuvenileJusticeStandards/) See also, *Law Enforcement's Leadership Role in Juvenile Justice Reform*, International Association of Chiefs of Police, July 2014 at pp. 8-9, available at <https://www.theiacp.org/sites/default/files/2018-07/JuvenileJusticeSummitReport.pdf>

<sup>ii</sup> The other four in ranking order were (1) 3<sup>rd</sup> degree assault (formerly simple assault); (2) 2<sup>nd</sup> degree burglary – non-violent; (4) the status offense of running away; and (5) breaking into autos. See 2017 Data Resource Guide, S.C. Department of Juvenile Justice at p. 10, available at <https://djj.sc.gov/sites/default/files/Documents/DJJ%20Resource%20Guide%20Final%20Draft%20FOR%200WEB.pdf>

<sup>iii</sup> As this is merely an administrative measure bringing the youngster's case to the attention of the court for a hearing, it should not be considered an *ex parte* communication.

<sup>iv</sup> Consistent with that order, victims of the alleged delinquent act should be provided notice of the hearing, similar to that of the summary court, in the directive at Section (h)(1).

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<sup>v</sup> See, Gupta-Kagan, McCormick & Meriwether, *Effective Solutions to South Carolina's Juvenile Justice Crisis: Safety, Rehabilitation and Fiscal Responsibility*, (April 2017), at p. 41, available at <http://www.pandasc.org/wp-content/uploads/2017/04/Juvenile-Justice-Report.pdf>

<sup>vi</sup> See Note (ii) at pp. 22-25.

<sup>vii</sup> Even absent the threat of contagion in those closed settings, the institutions are now the subject of potential intervention by the U.S. Department of Justice regarding conditions of confinement there. <https://www.justice.gov/crt/page/file/1244381/download>

<sup>viii</sup> See note iii at p. 13.

<sup>ix</sup> *The State* reports at least one employee at the Broad River Road complex has been diagnosed with the disease. *The State*, April 3<sup>rd</sup>, 2020.

<sup>x</sup> The letter is attached.



**Freddie B. Pough**  
Executive Director

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Columbia, SC 29221-1069

[djj.sc.gov](http://djj.sc.gov)

**Henry McMaster**  
Governor



March 17, 2020

SC Family Court Judges  
SC Sheriffs and Chiefs of Police  
SC Solicitors  
SC Public Defenders

To our Valued Partners in the Juvenile Justice System:

I am reaching out to you today asking for your assistance. We are certainly in unprecedented times in our state, our nation, and our world. As more cases of the Novel Coronavirus (COVID-19) were reported in South Carolina over the last week, we have seen our state and local leaders taking tremendous measures to mitigate the spread of this virus. Public schools are closed, communities are urged to limit public gatherings, and residents are encouraged to practice social distancing measures.

As state epidemiologist Dr. Linda Bell of the SC Department of Health and Environmental Control shared at Governor McMaster's press conference on Sunday, there is increased chance for disease spread in congregate settings. To that end, and in response to this public health crisis, I am asking for your assistance in ensuring that only those youth who must be in residential settings remain there at this time. This includes youth in secure detention, secure evaluation, secure commitment, and alternative placements.

I am seeking cooperation from you as a partner in the juvenile justice system to strongly consider only detaining and committing youth who are a current, serious risk to public safety. To the extent that DJJ can avoid the introduction of new youth to our residential settings at this time, we would prefer to do so in order to contain the potential spread of Coronavirus. While we have put appropriate measures in place, it can be very difficult to practice social distancing in a correctional or congregate care setting. DJJ has a number of alternatives available for your consideration, to include increased availability of electronic monitoring devices, increased case management and monitoring by ISOs, and availability of access to active electronic monitoring by our sister-agency DPPPS.

In addition, given the Chief Justice's Order yesterday for Family Courts in all counties to hear only emergency hearings (detention hearings), the population of youth who are currently undergoing secure evaluations and would otherwise be returning to court for disposition is of concern. DJJ county office staff will be reaching out to your offices to discuss these cases at the local level. DJJ is asking that the Court allow youth who can be returned to their community safely to await disposition to do so. DJJ is also asking that where the parties agree on a dispositional outcome following a secure evaluation (whether it be probation or commitment),

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*Empowering Our Youth for the Future*

that Consent Orders be signed so that those youth can be released or transition to admissions status and not linger in detainer status pending disposition. This also ensures that youth will be connected with identified treatment services as soon as possible.

Our priority remains the health, safety, and welfare of our youth, staff, and communities across the Palmetto State. I sincerely appreciate your cooperation in helping to mitigate the spread of this virus and working cooperatively with DJJ to make decisions that are in all of our collective best interests.

If I can answer any questions, please do not hesitate to contact me.

Respectfully,

A handwritten signature in blue ink, appearing to read "F. B. Pough", written over a light blue horizontal line.

Freddie B. Pough  
Executive Director

cc: Honorable Henry McMaster, Governor of South Carolina