

COVID-19 TESTING IN SAN DIEGO COUNTY JAILS INDIVIDUAL RIGHTS VS. PUBLIC HEALTH AND SAFETY

SUMMARY

The 2021/2022 San Diego County Grand Jury (Grand Jury) examined the SARS-CoV-2 (COVID-19) testing policy of the San Diego County Sheriff's Department (SDSD) as applied to arrestees who are being booked into the SDSD's detention facilities.

The Grand Jury found the procedures regarding testing of arrestees to be inconsistent with public welfare. Failure to require testing of all arrestees at intake for the COVID-19 virus increases the risk of infection to staff, other arrestees, and the general public.

For this reason, the Grand Jury recommends that the San Diego Sheriff's Department:

- Conform its practice with the CDC guidelines and with reference to the California Code of Regulations, implement mandatory COVID-19 testing (subject to any applicable mandatory legal exceptions) during the intake process to abate further contagion in detention facilities and to protect public health and safety
- Test all arrestees with rapid antigen tests approved under the FDA's Emergency Use Authorization (EUA).

INTRODUCTION

The status of the COVID-19 virus and public health measures in response to it are evolving rapidly and some statements made in this report should be read in that context. The Grand Jury is aware of a lawsuit pending in the San Diego Superior Court that raises issues pertaining to SDSD practices in its detention facilities, as they relate to COVID-19. No statements made in this report reference that matter and the Grand Jury takes no position with respect to the lawsuit.

The Grand Jury inspected SDSD detention facilities, including making inquiries about COVID-19 testing of arrestees at intake. Only four of the SDSD detention facilities accept new arrestees: San Diego Central Jail, Las Colinas Detention and Reentry Facility, Vista Detention Facility, and George F. Bailey Detention Facility. At the time of the Grand Jury jail inspections, conducted from August 2021 to December 2021, all incoming arrestees were offered a COVID-19 test, but they had the right to refuse a screening test upon signing a Refusal to Accept Medical Care/Treatment.¹

The COVID-19 virus is highly contagious, and transmission is by aerosol drops when an infected person coughs, sneezes, or talks.² Despite evidence of virus transmission in enclosed spaces, at

¹ "Refusal to Accept Medical Care/Treatment," San Diego Sheriff's Department Form J223, Revised 12/14. (See attached)

² "How COVID-19 Spreads," *COVID-19, Centers for Disease Control and Prevention*, updated July 14, 2021, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

the time of the Grand Jury inspections, arrestees were permitted to sign a waiver to refuse testing for COVID-19. Conversely, all arrestees, except pregnant women, were required to submit to x-ray testing for tuberculosis and full body scanning for contraband.³ The Grand Jury recommends that SDSA amend its protocol for the prevention of COVID-19, to include mandatory testing of all arrestees at intake.

METHODOLOGY

The Grand Jury toured the following facilities:

- San Diego Central Jail
- Las Colinas Detention and Reentry Facility
- George F. Bailey Detention Facility
- South Bay Detention Facility
- East Mesa Reentry Facility
- Vista Detention Facility
- Kearny Mesa Juvenile Detention Facility
- East Mesa Juvenile Detention Facility

The Grand Jury researched and reviewed:

- California Health and Safety Code
- California Code of Regulations
- CDC Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities
- San Diego County Sheriff's Detentions Policy and Procedures
- California Penal Code
- Case law

The Grand Jury interviewed sworn and non-sworn jail staff, representatives from the San Diego Sheriff's Department, and representatives from the County of San Diego's Department of Public Health.

DISCUSSION

Balancing the Rights of the Individual Against the Health and Safety of the Public

In American jurisprudence, an enduring tension exists between the rights and interests of the individual and the general welfare of the public and serves as a constitutional touchstone for courts and public entities as they seek to find a just and equitable balance between these two values. Although certain actions taken to enhance or preserve public health may have the effect of constraining individual autonomy, such actions in the service of the public good have frequently been sanctioned by case law.

³ San Diego Detention Services Bureau, Manual of Policies and Procedures I.50; California Code of Regulations, Title 15, Section 1207.

There are discernible standards for the proper care to be taken in guarding the individual rights granted by our Constitution, while simultaneously balancing those rights against the critical interests of public health and safety. The Grand Jury believes that with respect to the vital interests of the health, safety, and welfare of our community and those individuals in the custody and care of our county detention facilities, mandatory testing for the COVID-19 virus is warranted.

COVID-19 Testing of Arrestees at Intake:

California Code of Regulations, Title 15, Section 1207 states that all inmates must be screened for communicable diseases at time of intake:

With the exception of inmates transferred directly within a custody system with documented receiving screening, a screening *shall* be completed on all inmates at the time of intake. This screening *shall* be completed in accordance with written procedures and shall include but not be limited to medical and mental health problems, developmental disabilities, tuberculosis and *other communicable diseases*. The screening shall be performed by licensed health personnel or trained facility staff, with documentation of staff training.
(Emphasis added)

Further, Section 1206.5 (Title 15) goes on to require, in part, that the responsible physician, in conjunction with the facility administrator, (in this case, the San Diego Sheriff), and the county health officer, shall develop a written plan to address the identification, treatment, control and follow-up management of tuberculosis and other communicable diseases.

(b) Consistent with the above plan, the health authority shall, in cooperation with the facility administrator and the county health officer, set forth in writing, policies and procedures in conformance with applicable state and federal law, which include, but are not limited to:

(4) medical procedures required to identify the presence of disease(s) and lessen the risk of exposure to others;

The CDC recommends testing at detention facilities to identify current infection. Diagnostic testing is performed when a person has signs or symptoms of COVID-19 or is asymptomatic but suspected of exposure to a person with the virus. Screening testing is intended to identify people with the virus who are asymptomatic and do not have a known or suspected exposure.

The CDC further recommends that screening should be performed on all incoming arrestees at intake and that they should be housed separately from the rest of the facility's population – individually if feasible – while awaiting any test results. The CDC further states: this guidance should be adopted based on individual facilities physical space, staffing, population, operations,

history of SARS-CoV-2 outbreaks, community factors, and other resources and conditions.”⁴ Given the fact that the San Diego Sheriff’s Department offers COVID-19 testing to all inmates it reasonably follows that none of the criteria in the CDC guidance quoted above should preclude mandatory COVID-19 testing of all inmates.

The arrestee testing practices that the Grand Jury recommends would conform with this CDC guidance. To properly protect the health, safety, and welfare of inmates entrusted to the care of the SDSA, as well as that of the public, this CDC guidance should establish the standards for the SDSA.

COVID-19 Testing and San Diego Sheriff’s Department Detention Facilities

The CDC identifies two types of viral tests authorized by the FDA for diagnosing current infection with COVID-19.

- Nucleic acid amplification tests (NAATs) such as polymerase chain reaction (PCR) tests, are highly sensitive and specific and usually require laboratory processing time of approximately one to three days.
- Antigen tests, also called rapid tests, have similar specificity but are less sensitive than most NAATs. Generally, they are less expensive, can be processed at point-of-care, and have faster turnaround time than NAATs.⁵

Rapid tests may deliver results quickly enough to prevent sick individuals from potentially spreading the virus to others. For specimen collection, the CDC recommends a nasal swab, but notes that a throat specimen is also acceptable.⁶

At the time of the Grand Jury inspections, conducted from August 2021 to December 2021, and in interviews, we learned that SDSA was using a PCR-based test at intake on arrestees who consented to be tested. Arrestees were able to proactively refuse COVID testing at intake, and between July 4, 2021, and December 31, 2021, 56% of the arrestees did refuse to be tested.

FACTS AND FINDINGS

Fact: Screening arrestees for communicable diseases is mandated by California Title 15 Section 1207.

Fact: At the time of the Grand Jury detention facility inspections, conducted from August 2021 to December 2021, SDSA allowed arrestees to opt out of COVID-19 testing.

⁴ *Interim Guidance on Management of Coronavirus Disease in Correctional and Detention Facilities*, 5B and 5C, updated February 15, 2022, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#>.

⁵ *Ibid*, 5A.

⁶ *Interim Guidelines for Collecting and Handling of Clinical Specimens for COVID-19 Testing*, Updated October 25, 2021, <https://www.cdc.gov/coronavirus/2019-nCoV/lab/guidelines-clinical-specimens.html>.

Fact: Between July 4, 2021 and December 31, 2021, 56% of the arrestees offered COVID-19 tests refused to be tested.

Finding 1: The COVID-19 virus presents a serious risk to the staff and inmates at San Diego County's detention facilities and to the public health and safety generally.

Fact: The CDC permits the use of both rapid antigen and NAATs (including the PCR method) to detect COVID-19 infection.

Fact: Rapid antigen tests generally return results more quickly than a PCR test.

Fact: Most NAATs require laboratory processing and the turnaround time for test results is usually one to three days.

Fact: At the time of the Grand Jury inspections, conducted from August 2021 to December 2021, the SDSD administered only PCR tests.

Finding 2: At the time of the Grand Jury inspections, SDSD arrestees may have been unnecessarily exposed to COVID-19 because of the delayed test results.

RECOMMENDATIONS

The 2021/2022 San Diego Co Grand Jury recommends that the San Diego County Sheriff's Department:

22-42: Amend its COVID-19 prevention protocol to required mandatory COVID-19 testing of all arrestees at jail intake.

22-43: Test all arrestees at intake with rapid antigen tests approved under the FDA's Emergency Use Authorization.

REQUIREMENTS AND INSTRUCTIONS

The California Penal Code §933(c) requires any public agency which the Grand Jury has reviewed, and about which it has issued a final report, to comment to the Presiding Judge of the Superior Court on the findings and recommendations pertaining to matters under the control of the agency. Such comment shall be made *no later than 90 days* after the Grand Jury publishes its report (filed with the Clerk of the Court); except that in the case of a report containing findings and recommendations pertaining to a department or agency headed by an elected County official (e.g. District Attorney, Sheriff, etc.), such comment shall be made *within 60 days* to the Presiding Judge with an information copy sent to the Board of Supervisors.

Furthermore, California Penal Code §933.05(a), (b), (c), details, as follows, the manner in which such comment(s) are to be made:

(a) As to each grand jury finding, the responding person or entity shall indicate one of the following:

(1) The respondent agrees with the finding

- (2) The respondent disagrees wholly or partially with the finding, in which case the response shall specify the portion of the finding that is disputed and shall include an explanation of the reasons therefor.
- (b) As to each grand jury recommendation, the responding person or entity shall report one of the following actions:
 - (1) The recommendation has been implemented, with a summary regarding the implemented action.
 - (2) The recommendation has not yet been implemented, but will be implemented in the future, with a time frame for implementation.
 - (3) The recommendation requires further analysis, with an explanation and the scope and parameters of an analysis or study, and a time frame for the matter to be prepared for discussion by the officer or head of the agency or department being investigated or reviewed, including the governing body of the public agency when applicable. This time frame shall not exceed six months from the date of publication of the grand jury report.
 - (4) The recommendation will not be implemented because it is not warranted or is not reasonable, with an explanation therefor.
- (c) If a finding or recommendation of the grand jury addresses budgetary or personnel matters of a county agency or department headed by an elected officer, both the agency or department head and the Board of Supervisors shall respond if requested by the grand jury, but the response of the Board of Supervisors shall address only those budgetary or personnel matters over which it has some decision making authority. The response of the elected agency or department head shall address all aspects of the findings or recommendations affecting his or her agency or department.

Comments to the Presiding Judge of the Superior Court in compliance with the Penal Code §933.05 are required from the:

| <u>Responding Agency</u> | <u>Recommendations</u> | <u>Date</u> |
|--|-------------------------------|--------------------|
| San Diego County Sheriff's Department | 22-42 and 22-43 | 8/22/22 |