March 19, 2020

The Honorable William P. Barr  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530

The Honorable Jeffrey A. Rosen  
Deputy Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530

Mr. Michael Carvajal  
Director  
Federal Bureau of Prisons  
320 First Street NW  
Washington, DC 20534

Dear Attorney General Barr, Deputy Attorney Rosen, and Director Carvajal:

We write on behalf of the Federal Public and Community Defenders. At any given time, Defenders and other appointed counsel under the Criminal Justice Act represent 80 to 90 percent of all federal defendants because they cannot afford counsel.

The COVID-19 global pandemic has turned our nation’s jails and prisons into ticking time bombs. These jails and prisons do not provide adequate medical care in the best of times.¹ Many prisons and

¹ See U.S. Dep’t of Justice Office of the Inspector General, Review of the Federal Bureau of Prisons’ Medical Staffing Challenges (Mar. 2016), https://oig.justice.gov/reports/2016/e1602.pdf (finding that the BOP experienced chronic medical staff shortages and failed to take adequate measures to address them, leading to problems meeting the medical needs of prisoners, requiring the use of outside hospitals, and endangering the safety and security of institutions); U.S. Dep’t of Justice Office of the Inspector General, The Impact of an Aging Inmate Population on the Federal Bureau of Prisons (Rev. Feb. 2016), https://oig.justice.gov/reports/2015/e1505.pdf (finding that BOP facilities and services, including medical services, were inadequate to meet the needs of an aging prison population leading to delays in medical treatment for prisoners with acute and chronic heart and neurological conditions, who wait an average of 114 days to see medical specialists.); David Patton, Statement
pretrial detention facilities are dramatically understaffed, and populated by individuals who are older and medically compromised. Today, the Bureau of Prisons (BOP) confirmed that two staff members were presumed positive for COVID-19, marking the first possible cases in the federal prison system. They are surely not the last. As BOP has itself acknowledged, the risks of the rapid transmission of contagion in the tight quarters of prisons and jails present major challenges in keeping inmates and staff safe and healthy. This stark reality has been widely recognized.

Lowering the population of prisons and jails is the simplest and most effective way to disrupt the transmission of COVID-19. Our clients and other incarcerated individuals—along with the correctional officers, attorneys, and contractors who spend their days moving between prisons and jails—will be at much lower risk. In the statement released by the Federal Bureau of Prisons Director, it is also emphasized the immediate need to reduce the prison population in the United States.


the public—are in grave and imminent danger.\(^7\) We urge you to use existing authority to take immediate and decisive action to both reduce the number of people entering federal detention and release individuals who are already incarcerated. Failure to do so may well be a death sentence for many.

It is imperative that the Department of Justice immediately take the following two steps:

1. Direct all United States Attorneys’ Offices to minimize arrests, decline to seek detention of individuals at their initial appearance in court and consent to the release of those already detained except in cases involving a specific and substantial risk that a person will cause bodily injury to or use violent force against the person of another; and

2. Direct BOP to utilize its existing authorities under the First Step Act and Second Chance Act to maximize the use of community corrections and compassionate release.

A. The Department of Justice Should Take Immediate Measures to Suspend New Arrests, Reduce Court Appearances, And Reduce Pretrial Detention.

Numerous state and local jurisdictions have already taken smart steps to dramatically reduce the number of people entering and remaining in detention.\(^8\) DOJ and Immigrations and Customs

---

\(^7\) Over 175,000 individuals are incarcerated in federal prisons and jails, and thousands of people move in and out of federal prisons every day. See U.S. Fed. Bureau of Prisons, *Statistics*, https://www.bop.gov/about/statistics/population_statistics.jsp.

Enforcement (ICE) have taken initial—but insufficient—steps in the same direction. DOJ should immediately expand their efforts more broadly.

These changes will neither jeopardize public safety nor increase failure to appear rates; data proves that higher federal release rates do not lead to more crime or flight. Even before this crisis, the Chair of the House Judiciary Committee lamented that federal “release rates have steeply declined” since the passage of the Bail Reform Act, and said, “surely community safety does not justify this trend.”

U.S. Attorney’s offices should be directed to:

1. Decline or suspend prosecutions, except in cases involving a specific and substantial risk that a person will cause bodily injury to or use violent force against the person of another.
2. Seek arrest warrants only in cases involving a specific and substantial risk that a person will cause bodily injury to or use violent force against the person of another, and recall outstanding warrants in cases that do not involve such a risk;
3. Decline to seek detention of individuals at their initial appearance in court and consent to the release of those already detained absent cases involving a specific and substantial risk that a person will cause bodily injury to or use violent force against the person of another. Failure to adopt this policy would run afoul of the Constitution; pretrial detention under these circumstances is constitutionally suspect.

---


10 In 2019, fully 99% of released federal defendants nationwide appeared for court, and over 98% did not commit new offenses while on bond. See AO Table H-15, http://jnet.ao.dcn/sites/default/files/pdf/H15_Ending12312019.pdf (showing a nationwide failure to appear rate of 1.1% and a rearrest rate of 1.8% in 2019).

---

circumstances is not purely “regulatory in nature,” but rather “constitute[s] punishment before trial in violation of the Due Process Clause.””\textsuperscript{12}

\textbf{B. BOP Should Immediately Accelerate And Expand Inmates’ Transfer To Community Corrections.}

We strongly urge BOP to exercise its discretion to designate inmates to community corrections under 18 U.S.C. § 3621(b) to maximize the length of time prisoners eligible for community corrections participate in such programs. Because the average time individuals spend in community corrections has been only about one third of the available time, increased utilization of community corrections could result in a substantial difference in the prison population.\textsuperscript{13} The Second Chance Act expanded to one year the amount of time a prisoner can spend in community placement and provided that the lesser of up to six months of that time, or ten percent of the sentence imposed, could be spent in home confinement. 18 U.S.C. § 3624(c). The First Step Act took pains to underscore this expansion, providing in section 602:

\begin{quote}
Home confinement authority. – The authority under this subsection may be used to place a prisoner in home confinement for the shorter of 10 percent of the term of imprisonment of that prisoner or 6 months. The Bureau of Prisons shall, to the extent practicable, place prisoners with lower risk levels and lower needs on home confinement for the maximum amount of time permitted under this paragraph.\textsuperscript{14}
\end{quote}

BOP has directed staff to comply with this directive.\textsuperscript{15}

Accelerating and expanding the use of community corrections in response to the national emergency is consistent with statutes and rules that require individualized consideration of the length of community corrections.\textsuperscript{16} General and specific risks arising from the COVID-19 pandemic must be

\textsuperscript{12} United States v. Salerno, 481 U.S. 739, 748 (1987).


\textsuperscript{16} See 18 U.S.C. § 3621(b)(3) (requiring consideration of designation decision include the “characteristics of the prisoner”); 18 U.S.C. § 3624(c)(6)(B) (requiring regulation that includes placement in community corrections “determined on an individual basis”); 28 C.F.R. § 524.11(b) (providing for program reviews with prisoner participation). In addition, BOP would be meeting the statutory directives calling for maximum time in community corrections for certain categories of prisoners. See 18 U.S.C. § 3624(c)(2) (“The Bureau of Prisons shall, to the extent practicable, place prisoners with lower risk levels and lower needs on home confinement for the maximum amount of time permitted under this paragraph.”); 34 U.S.C. § 60541 (a)(2)(A) (“Incentives for a prisoner who participates in reentry and skill development programs which may, at the discretion of the Director, include [] the maximum period in a community confinement facility”); Fed. Bureau
considered in making these individualized assessments. BOP currently has the authority to immediately and significantly expand its use of community-based correctional facilities. Congress recognized the value of providing community-based reentry by both doubling the time of community corrections in the Second Chance Act and by expanding potential community corrections beyond one year for certain prisoners eligible for earned time credits in the First Step Act. Full utilization of community corrections to reduce BOP’s population is consistent with Congress’s purpose in enacting those laws.

BOP can exercise its designation authority to address COVID-19 by directing staff to reassess, pursuant to 18 U.S.C. § 3621(b), whether individuals can be immediately transferred to community corrections for the maximum available time or otherwise accelerate transfer to community corrections. BOP should also increase use of the elderly offender pilot program for home confinement, as modified by § 603 of the First Step Act. The First Step Act’s expansion of this program reflects the lower recidivism rate for elderly offenders and allows BOP to place vulnerable offenders over 60 years old in home confinement for a larger portion of their sentence. See 18 U.S.C. § 3621(c)(1); 34 U.S.C. § 60541(g)(1)(C).

C. BOP Should Expand The “Extraordinary And Compelling Reasons” In Program Statement 5050.50 To Include Vulnerability To COVID-19.

The First Step Act expanded sentencing courts’ discretion to reduce sentences based on “extraordinary and compelling reasons” under 18 U.S.C. § 3582(c)(1)(A)(i). The COVID-19 pandemic unquestionably constitutes “extraordinary and compelling reasons.” Centers for Disease Control and Prevention has identified persons over the age of 60, as well as persons with diabetes, respiratory problems, and compromised immune systems as facing special danger from COVID-19.

BOP should respond to this national emergency by amending its policy statement on compassionate release to specifically include consideration of those individuals in prison whose health is most at risk with this pandemic. The United States Sentencing Commission’s examples of extraordinary and compelling reasons in the commentary to the compassionate release guideline recognize BOP’s continued authority to recommend a reduction in sentence based on factors other than those already identified. U.S.S.G. § 1B1.13, comment n.1(D). By informally amending its compassionate release program statement on an emergency basis, BOP could directly address the need for judicial of Prisons, Program Statement 5330.11: Psychology Treatment Programs, § 2.5.15(a)(1)(ii) (incentives for RDAP participation), 19 (2009) (RDAP participants should receive “[c]onsideration for the maximum period of time in a community-based treatment program[]”).


consideration of reduced sentences for those who are particularly susceptible to COVID-19, with the sentencing judge making the ultimate decision on whether to grant a reduction.

This simple yet significant policy change would make it easier for courts to remove vulnerable inmates from prison while at the same time making prisons safer by lowering the inmate population. This change would be most effective if BOP used the same mechanisms for publicity and assistance in contacting counsel for terminal conditions to identify and notify individuals who are particularly vulnerable to complications from COVID-19. BOP should address compassionate release requests from these individuals on an expedited basis with a presumption in favor of release to supervision in the community. In 2019, BOP took an average of 39 days to determine whether to file a Reduction in Sentence motion under 18 U.S.C. § 3582(c)(1)(A) for terminally ill prisoners and 58 days for debilitated prisoners. For individuals requesting compassionate release for non-medical reasons such as elderly age, or to serve as a caretaker to a child or spouse, the BOP took an average of 171 days.20 That year, 41 people died waiting for action on their request.21 These delays must be cut dramatically if vulnerable prisoners are to be protected during an outbreak.

The COVID-19 pandemic creates heightened risks for detained individuals and the greater community that must and can be addressed immediately. We welcome any opportunity to provide you with additional information and support for these critical and time-sensitive next steps.

Sincerely,

s/
David Patton
Executive Director, Federal Defenders of New York
Co-Chair, Federal Defender Legislative Committee

s/
Jon Sands
Federal Public Defender for the District of Arizona
Co-Chair, Federal Defender Legislative Committee

s/
Lisa Freeland
Federal Public Defender for the Western District of Pennsylvania
Chair, Defender Services Advisory Group

---


21 See id. at 4-5.