



August 4, 2020

The Honorable Mitch McConnell
Majority Leader
United States Senate
Washington, D.C. 20510

The Honorable Charles Schumer
Minority Leader
United States Senate
Washington, D.C. 20510

The Honorable Nancy Pelosi
Speaker
United States House of Representatives
Washington, D.C. 20515

The Honorable Kevin McCarthy
Minority Leader
United States House of Representatives
Washington, D.C. 20515

Dear Majority Leader McConnell, Speaker Pelosi, Minority Leader Schumer, and Minority Leader McCarthy:

On behalf of The Leadership Conference on Civil and Human Rights, the American Civil Liberties Union, and the Federal Public and Community Public Defenders, we urge you to include critical provisions to protect the health and safety of incarcerated individuals in the COVID-19 response package currently being negotiated. The Leadership Conference is a coalition charged by its diverse membership of more than 220 national organizations to promote and protect civil and human rights in the United States; the American Civil Liberties Union is a nationwide organization with more than 8 million members, activists, and supporters fighting tirelessly in all 50 states, Puerto Rico, and Washington, D.C., to safeguard everyone's rights; and the Federal Public and Community Defenders is an organization that, at any given time, represents the vast majority of individuals facing federal prosecution. While the Coronavirus Aid, Relief, and Economic Security (CARES) Act expanded the Federal Bureau of Prison's (BOP) authority to release individuals to home confinement, BOP and the Department of Justice (DOJ) have failed to exercise this authority. BOP and DOJ have been negligent in meeting Congress' charge to quickly and safely reduce the prison population and minimize the spread and harm of COVID-19 for incarcerated persons and correctional staff. Therefore, more is urgently required to address the alarmingly high infection rates occurring in correctional facilities across the nation.

As Congress works to provide additional relief for individuals impacted by the pandemic, it has a moral obligation to extend that relief to all of our most vulnerable — the elderly, the sick, those without medical care, and those unable to protect themselves from the virus — including those who are incarcerated. We urge you to prioritize the health and wellbeing of incarcerated people and their families by incorporating the five recommendations outlined below in the next stimulus package.

All of us are at risk of contracting COVID-19 and the more than 2.2 million individuals currently incarcerated nationwide remain uniquely vulnerable. The unsanitary and overcrowded conditions in correctional facilities make it nearly impossible to appropriately disinfect surfaces or socially distance,¹ and access to quality medical care in many of these facilities has historically been lacking.² Further, high rates of underlying health issues among incarcerated populations place many individuals in custody in high-risk categories that make them more susceptible to complications if they do contract the virus.³ One study found that incarcerated individuals are three times more likely to die and more than five times more likely to become infected than the general population.⁴

As coronavirus cases continue to surge across the country, prisons and jails have emerged as hotspots for outbreaks. Currently, the twelve largest known virus clusters are connected not to hard-hit nursing homes or meatpacking plants, but to correctional institutions.⁵ Between mid-May and mid-June, the number of infections in prisons doubled and prison deaths increased by 73 percent.⁶ More than 100,000 individuals in incarceration facilities have now contracted the virus, and at least 800 incarcerated individuals and correctional staff have died as a result.⁷ While California state prisons and jails — which make up five of the twelve hotspots⁸ — have recorded more than 7,700 coronavirus cases as of July 30, some states with significantly smaller incarcerated populations actually have similarly high infection rates.⁹ For example, Kentucky's rate of 716 cases per 10,000 prisoners is actually slightly higher than California's rate of 702.¹⁰ Last month, BOP recorded the death of the 100th federal prisoner,¹¹ and more are certainly to come in the weeks ahead.

¹ See, e.g., Morse, D. and Jouvenal, J. (Apr. 10, 2020). *Inmates sharing sinks, showers and cells say social distancing isn't possible in Maryland prisons*. THE WASHINGTON POST.

https://www.washingtonpost.com/local/public-safety/inmates-sharing-sinks-showers-and-cells-say-social-distancing-isnt-possible-in-maryland-prisons/2020/04/10/5b1d5cf8-7913-11ea-9bee-c5bf9d2e3288_story.html

² See, e.g., Honderich, H. and Popat, S. (July 27, 2020). *Coronavirus: Can this California prison save itself from Covid-19?* BBC NEWS. <https://www.bbc.com/news/world-us-canada-53476208>; Novak, K. (July 9, 2020). *Inmates Say Poor Conditions, Medical Care Continue at San Quentin*. KCBS RADIO.

<https://kpbsradio.radio.com/articles/inmates-say-poor-conditions-continue-at-san-quentin>

³ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics. (Oct. 4, 2016). Special Report: Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-12.

<https://www.bjs.gov/content/pub/pdf/mpsfpi1112.pdf>

⁴ Carissimo, J. (July 11, 2020). *Inmates are 5 times more likely to get coronavirus than the general population, study says*. CBS NEWS. <https://www.cbsnews.com/news/coronavirus-prison-inmates-more-likely-to-get-infected-study-says/>

⁵ Coronavirus in the U.S.: Latest Map and Case Count. (July 30, 2020). THE NEW YORK TIMES.

<https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#clusters>

⁶ Williams, T., Seline, L., and Griesbach, R. (June 30, 2020). *Coronavirus Cases Rise Sharply in Prisons Even as They Plateau Nationwide*. THE NEW YORK TIMES. <https://www.nytimes.com/2020/06/16/us/coronavirus-inmates-prisons-jails.html>

⁷ Coronavirus in the U.S.: Latest Map and Case Count. (July 30, 2020). THE NEW YORK TIMES.

<https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#clusters>

⁸ Coronavirus in the U.S.: Latest Map and Case Count. (July 30, 2020). THE NEW YORK TIMES.

<https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#clusters>

⁹ The Marshall Project. (July 30, 2020). *A State-by-State Look at Coronavirus in Prisons*.

<https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>

¹⁰ *Ibid.*

¹¹ Hymes, C. (July 28, 2020). *Federal prisons reach grim milestone: 100 inmate deaths from coronavirus*. CBS NEWS. <https://www.cbsnews.com/news/coronavirus-100-federal-prison-inmates-covid-deaths/>

While these numbers are staggering, they almost certainly do not represent the actual number of infected individuals given the low number of tests conducted. At the federal level, BOP reports that it has completed testing for just 41,345 individuals as of August 4, despite overseeing a total of over 142,315 individuals in both BOP-managed and community-based facilities.¹² Similarly low rates of testing have occurred in state facilities, where Centers for Disease Control and Prevention (CDC) guidelines recommend testing only for symptomatic people and their close contacts in most cases, despite widespread knowledge of asymptomatic spread.¹³ For example, as of mid-June, state prison systems in Illinois, Mississippi, and Alabama had tested less than 2.5 percent of incarcerated individuals, and testing of approximately 3 percent of individuals incarcerated in New York revealed that more than 40 percent were infected.¹⁴ Failing to ensure the safety of individuals in our prisons and jails is not only an abdication of our societal responsibility to protect our most vulnerable, but a danger to our ability to effectively control the spread of COVID-19 and limit the damage this pandemic will cause.

Congress must take immediate action to provide for the protection, release, and safe reentry of incarcerated people. The actions taken in the last enacted stimulus package — the CARES Act on March 27, 2020, were a welcome step, but are far from enough. Despite the additional authority granted to it through the stimulus legislation, BOP has not meaningfully reduced its prison population in response to the pandemic. It has instead adopted exceedingly narrow criteria for determining individuals eligible for release,¹⁵ rendering the directive to “immediately process” suitable candidates under the DOJ’s April 3 memorandum ineffective.¹⁶

In the three weeks following that memo, BOP granted just 1,027 people home confinement, and reduced its prison population by just 3,400 individuals in the month of April — a number that falls below the pre-pandemic monthly average of 3,700 individuals despite including regularly occurring releases.¹⁷ Fewer than 1,400 people were released from BOP-affiliated halfway houses between April 2 and April 25,¹⁸ and fewer than 150 elderly or medically vulnerable prisoners

¹² U.S. Department of Justice, Federal Bureau of Prisons. *COVID-19 Coronavirus*.

<https://www.bop.gov/coronavirus/>

¹³ Williams, T., Seline, L., and Griesbach, R. (June 30, 2020). *Coronavirus Cases Rise Sharply in Prisons Even as They Plateau Nationwide*. THE NEW YORK TIMES. <https://www.nytimes.com/2020/06/16/us/coronavirus-inmates-prisons-jails.html>; Centers for Disease Control and Prevention. (July 17, 2020). *Testing Overview*.

https://www.cdc.gov/coronavirus/2019-ncov/hcp/testing-overview.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fhcp%2Fclinical-criteria.html

¹⁴ Williams, T., Seline, L., and Griesbach, R. (June 30, 2020). *Coronavirus Cases Rise Sharply in Prisons Even as They Plateau Nationwide*. THE NEW YORK TIMES. <https://www.nytimes.com/2020/06/16/us/coronavirus-inmates-prisons-jails.html>

¹⁵ Barr, L. and Mallin, A. (Apr. 24, 2020). *DOJ clarifies federal inmate release guidance after confusion plagues process*. ABC NEWS. <https://abcnews.go.com/US/doj-clarifies-federal-inmate-release-guidance-confusion-plagues/story?id=70318981>

¹⁶ Memorandum from the Attorney General, U.S. Department of Justice, to Director, Bureau of Prisons, U.S. Department of Justice. (Apr. 3, 2020).

https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement_april3.pdf

¹⁷ Neff, J. and Blakinger, K. (Apr. 25, 2020). *Few Federal Prisoners Released Under COVID-10 Emergency Policies*. THE MARSHALL PROJECT. <https://www.themarshallproject.org/2020/04/25/few-federal-prisoners-released-under-covid-19-emergency-policies>

¹⁸ *Ibid.*

were granted compassionate release prior to April 2.¹⁹ Now, more than four months after the Attorney General's initial March 26 memo to prioritize the use of "statutory authorities to grant home confinement" to individuals at high-risk for COVID-19,²⁰ BOP has continued to slow-walk or fail to exercise its authority. It has released just 7,282 people to home confinement – a number that appears to include regularly scheduled transfers in addition to those taken pursuant to CARES Act authorities,²¹ and at least 25 individuals have died while their requests for sentence reductions were pending with the Bureau.²² Moreover, the Bureau has continued to actively work against decarceration for individuals, opposing or not responding to 48 of the 50 compassionate release cases decided in early July, and agreeing to release before court intervention in just two cases.²³

It is therefore absolutely critical that Congress act swiftly to address the issues facing incarcerated individuals in the next COVID-19 relief package. At a minimum, such legislation should include:

1. **Provisions that will dramatically reduce pretrial and prison populations.** Congress should take action to ensure that additional individuals are being released, not detained, during a public health crisis. This means final COVID-19 relief legislation should include the Emergency Community Supervision Act (§191102 of the House-passed Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act)(S. 3646), which would mandate release or transfer to community supervision of individuals in federal prison or pretrial detention who are most at risk to contracting the virus and experiencing severe illness or death. The populations most at risk are those who are age 50 and older, have underlying health conditions, or are pregnant.

Inclusion of the Emergency Community Supervision Act in the next relief bill would prevent deaths like that of Andrea High Bear, a mother who died shortly after being transferred from a jail in South Dakota to Carswell Federal Medical Center (FMC) in Texas, just 28 days after giving birth via C-section while on a ventilator. The 30-year-old member of the Cheyenne River Sioux Tribe in South Dakota was the first federally incarcerated woman to die from COVID-19. Rather than learn from that tragedy, BOP has permitted COVID-19 to rage at FMC Carswell: the facility now reports the second-highest rate of infection in the BOP.

¹⁹ [Ibid.](#)

²⁰ Memorandum from the Attorney General, U.S. Department of Justice, to Director, Bureau of Prisons, U.S. Department of Justice. (Mar. 26, 2020). https://www.bop.gov/resources/news/pdfs/20200405_covid-19_home_confinement.pdf

²¹ U.S. Department of Justice, Federal Bureau of Prisons. *COVID-19 Coronavirus*. <https://www.bop.gov/coronavirus/>

²² Moyer, J.W., and Satija, N. (Aug. 3, 2020). *Frail inmates could be sent home to prevent the spread of covid-19. Instead, some are dying in federal prisons*. THE WASHINGTON POST. https://www.washingtonpost.com/local/public-safety/frail-inmates-could-be-sent-home-to-prevent-the-spread-of-covid-19-instead-some-are-dying-in-federal-prisons/2020/08/02/992fd484-b636-11ea-9b0f-c797548c1154_story.html?hpid=hp_hp-top-table-main_virusdeadinmates-12pm%3Ahomepage%2Fstory-ans

²³ [Ibid.](#)

The Emergency Community Supervision Act would also modify probation and supervised release policies to be safer and less punitive and mandate the release of low-level pretrial defendants on their own recognizance.

- 2. An expansion of court authority to release individuals in BOP Custody.** Congress should build upon the actions taken in the CARES Act by expanding the authority of courts to order compassionate release and reduce sentences for individuals incarcerated in the federal prison system. It should include in any relief package the COVID-19 Safer Detention Act (S. 4034), which would clarify the authority of courts to order compassionate release based on COVID-19 vulnerability, ensure that individuals sentenced before 1987 may seek compassionate release, and reduce the amount of time courts must wait before considering compassionate release motions during the coronavirus crisis.

Additionally, any negotiated legislation should include §191103(a)(1)-(3) of the HEROES Act, which would require courts to reduce the sentences of individuals most vulnerable to COVID-19 who do not pose a danger to society. The term “covered health condition” in that provision should be amended to cross-reference the CDC’s list of individuals who might be at heightened risk of severe complications from COVID-19, in addition to existing enumerated health conditions, to allow flexibility in the law as medical understandings of COVID-19 continue to evolve.

- 3. Increases in the availability of home detention for elderly people.** Our detention of elderly and other high-risk individuals who pose no danger was already inhumane and unhealthy but has become even more so amid the coronavirus pandemic. Over a quarter of the people who have died from COVID-19 while in BOP’s care were seventy years or older.²⁴ Legislation should include provisions of the COVID-19 Safer Detention Act that improve and expand eligibility criteria for the First Step Act’s Elderly Home Detention Pilot program, which permits the transfer of certain elderly and terminally ill prisoners from prison to home detention after serving a portion of their sentence.
- 4. Provisions that facilitate essential communication with counsel.** Given the restrictions on in-person activities put in place to address the coronavirus pandemic, it is imperative that Congress include provisions in any legislation to ensure that individuals in custody retain the ability to speak with their attorneys confidentially and as necessary. The Effective Assistance of Counsel in the Digital Era Act (H.R. 5546) should be included in relief legislation to direct the Attorney General to put in place an electronic communication system for persons in federal custody that ensures confidential communication between attorneys and clients.

²⁴ Sentencing Resource Counsel for the Federal Public and Community Defenders. (July 30, 2020). *The Worsening COVID-19 Crisis in Federal Detention*. https://www.fd.org/sites/default/files/covid19/bop_jail_policies_and_information/2020_07_30_covid_19_in_federal_detention_src_fact_sheet_v2.pdf

- 5. Additional support at the federal, state, and local level to prevent, prepare for, and respond to coronavirus.** In the CARES Act, Congress provided \$100 million in emergency funding to the federal prison system to respond to COVID-19. In forthcoming legislation, Congress should provide an additional \$200 million to expand testing and other medical services, the provision of personal protective equipment and hygiene supplies, and sanitation services that are vital to maintaining the safety of the individuals who remain incarcerated as well as correctional staff. Congress should adopt language from the COVID-19 Correctional Facility Emergency Response Act (H.R. 6414/S. 3720), which would establish a grant program within DOJ to facilitate reentry planning and support and encourage correctional facility releases by states. Additional funding to prevent and mitigate COVID-19 risks for justice-involved youth, to ensure free access to COVID-19 testing, medical care, and sanitation for incarcerated and reentering individuals, and to provide support to reentering individuals should also be provided.

Congress must take action to protect the health and safety of every individual in our communities — including those who are incarcerated — in order to successfully slow the spread of COVID-19 and put the United States on the road to recovery. We urge Congress to ensure that the most vulnerable among us are not forgotten in the next coronavirus response package by including the critical provisions outlined above to protect, release, and provide safe reentry for incarcerated people.

If you have questions or concerns, please contact Sakira Cook, Director, Justice Reform Program, The Leadership Conference on Civil and Human Rights, at cook@civilrights.org; Kanya Bennett, Senior Legislative Counsel, ACLU, at kbennett@aclu.org; or Patricia Richman, National Sentencing Resource Counsel, Federal Public and Community Defenders, at Patricia_Richman@fd.org.

Sincerely,

The Leadership Conference on Civil and Human Rights
American Civil Liberties Union
The Federal Public and Community Public Defenders