

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

UNITED STATES OF AMERICA

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v.

NO. 1:17-CR-00034

REALITY LEIGH WINNER

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**DEFENDANT’S REPLY IN SUPPORT OF
MOTION FOR COMPASSIONATE RELEASE**

Defendant Reality Leigh Winner (“Defendant” or “Reality”), by her undersigned attorneys and pursuant to 18 U.S.C. 3582(c), hereby files this Reply Memorandum in Support of her Motion for Compassionate Release.

INTRODUCTION

The Republic is fragile. Ronald Reagan said that “Freedom ... is never more than one generation away from extinction,” in his inaugural address as Governor of the State of California in 1967. And it is. In a country where individuals enjoy more freedoms and opportunities, and society places a high value on human rights, we incarcerate more people per capita than any of our developed peers. The First Step Act (“FSA”), enacted in 2018, sought to remediate this issue, in part, by providing prisoners an avenue to freedom from incarceration in times of “extraordinary and compelling” need with an option to petition the Court for compassionate release. Now, this Court must decide whether it will go against the tide of its brethren District Courts and limit freedom or, will it join the majority of the District Courts in this country and find that it may grant Reality, an at-risk inmate, in an at-risk institution, compassionate release in the face of a global pandemic? Surely, logic, jurisprudence, compassion, and fairness compel release.

ARGUMENT

I. The BOP's Response to the COVID-19 Pandemic is Insufficient.

The reporting of the Bureau of Prisons (“BOP”), which BOP’s Office of Public Affairs admits is understated,¹ confirms that total numbers of confirmed infections within the federal prison system have *more than doubled* since Reality’s Motion was filed *less than two weeks ago*.

*As of 04/21/2020, there are 540 federal inmates and 323 BOP staff who have confirmed positive test results for COVID-19 nationwide ... There have been 23 federal inmate deaths and 0 BOP staff member deaths attributed to COVID-19 disease.*²

Moreover, “Testing of prisoners has been limited, so the true infection rate is thought to be much higher.”³ Indeed, the BOP has admitted in recent filings that it does not have enough tests.⁴

With each passing day, COVID-19 continues to spread like wildfire throughout the BOP system. Facilities are taking drastic measures that illustrate the exigency of these circumstances. “Most recently, the entire population of FCI Otisville camp (111) inmates was sent to quarantine in preparation for release to home confinement.”⁵ At FCI Oakdale, it has gotten so bad that

¹ Walter Pavlo, *AG William Barr’s Memo to Bureau of Prisons: ‘Time Is Of The Essence’* (April 4, 2020), <https://www.forbes.com/sites/walterpavlo/2020/04/04/ag-william-barrs-new-memo-to-bureau-of-prisons-time-is-of-the-essence/#634a22376805> (last accessed April 21, 2020) (*quoting* Sue Allison, spokeswoman for BOP) (“The goal of our reporting is to provide the public with insight as to the current status of our COVID-19 response at various facilities. As can be seen from various state websites, for example Maryland, reporting of cases while tied to positive cases, does not necessarily account for unconfirmed cases.”).

² See Federal Bureau of Prisons, COVID-19 Cases, <https://www.bop.gov/coronavirus/> (last accessed on April 21, 2020) (emphasis added).

³ Josh Gerstein, *Virus-wracked federal prisons again expand release criteria* (April 11, 2020) <https://www.politico.com/news/2020/04/11/federal-prison-release-criteria-coronavirus-179835> (last accessed April 21, 2020).

⁴ Newsletter to Federal Prisoners, Internal Memo Toughens Cares Act Home Confinement Standards (April 20, 2020) <https://www.lisa-legalinfo.com/newsletter-to-federal-prisoners/> (last accessed on April 21, 2020).

⁵ *Id.*

“correctional officers were told to stop testing people and just assume anyone with symptoms had been infected.”⁶

Yet, in pleadings across the country, like the one filed presently, *see* ECF No. 345, federal prosecutors continue to assure courts that the situation in BOP facilities is under control. These representations claim that BOP’s facilities have comprehensive precautionary measures in place to prevent the transmission of COVID-19, and in any case, the facilities are well-equipped to deliver care. But, these empty claims are demonstrably inaccurate.⁷ Moreover, despite the best intentions of the Department of Justice (“**DOJ**”) and Attorney General William Barr’s admonitions that “time is of the essence,”⁸ the BOP is dragging its feet. The agency lacks the resources necessary to fix the problem. As a result, Reality – a vulnerable, non-violent, first time offender with underlying conditions, who has less than 20 months left to serve on a sentence of more than five years – is exposed.

⁶ *Id.*

⁷ *See* Letter from David Patton et al., Co-Chairs of the Federal Public & Community Defenders Legislative Committee, to Hon. William P. Barr, Atty. Gen. 3 (Apr. 1, 2020), https://www.fd.org/sites/default/files/covid19/defender_letter_ag_barr_re_covid-19_4-1-20_0.pdf (last accessed April 21, 2020), a true and correct copy of which is attached hereto as **Exhibit A**. This Court may consider Exhibit A (and the other exhibits attached hereto) on reply because good cause exists. “While the Court has a liberal briefing rule, *see Podger v. Gulfstream Aerospace Corp.*, 212 F.R.D. 609, 609 (S.D. Ga. 2003) (“parties may file as many reply briefs as they want”), it has not yet clarified whether new arguments may be raised within such briefs without good cause.” *Pattee v. Georgia Ports Auth.*, 477 F. Supp. 2d 1253, 1272 n.8 (S.D. Ga. 2006) (allowing additional argument and support to be raised in reply brief). Good cause exists here because Defendant must respond to the Government’s claims about the BOP’s preparedness for this epidemic and because Defendant did not anticipate that the Government would take the position that she did not submit an administrative request when she unequivocally did. Defendant is permitted to attach documents to her reply brief that rebut the arguments the Government raises, for the first time, in its opposition. *Id.*

⁸ Memo from Attorney Gen. William Barr to Director of BOP (April 3, 2020), *Increasing Use of Home Confinement at Institutions Most Affected by COVID-19* (April 3, 2020), <https://www.politico.com/f/?id=00000171-4255-d6b1-a3f1-c6d51b810000>.

The BOP is reporting that it has now placed an additional 1,280 inmates on home confinement. But, the BOP has some 177,000 inmates under its care, and the majority of those who have been moved into home confinement come from a handful of states including New York, New Jersey, Ohio, Colorado, and California.⁹ Indeed, the BOP's own webpage confirms that the BOP's focus is "starting with the inmates incarcerated at FCI Oakdale, FCI Danbury, FCI Elkton and similarly-situated facilities to determine which inmates are suitable for home confinement."¹⁰

This sounds promising and appears to align with Attorney General Barr's direction for prisoners in *certain* facilities (like FCI Otisville in New York, FCI Oakdale, FCI Danbury, and FCI Elkton); however AG Barr's guidance to prioritize problem facilities was *not* to the exclusion of others. And even in places like FCI Oakdale, where there have been at least five (5) inmate deaths, the BOP response is so inadequate and slow that the ACLU has sued the facility "for not releasing inmates fast enough."¹¹ So, if inmates in priority facilities cannot get their cases reviewed fast enough, what does it mean for people like Reality? The BOP has forgotten her.

a. BOP is Not Equipped to Handle a Pandemic

First, BOP is claiming, and the is Government representing, that they never received Reality's request.¹² But, attached hereto as **Exhibit B** is a true and correct copy of the Declaration

⁹ Elie Honig, *Releasing prisoners during Covid-19 crisis makes good sense* (April 20, 2020), <https://www.cnn.com/2020/04/20/opinions/covid-19-prosecutors-prison-release-honig/index.html> (last accessed April 21, 2020).

¹⁰ See Federal Bureau of Prisons, *Update on COVID-19 and Home Confinement* (April 5, 2020), https://www.bop.gov/resources/news/20200405_covid19_home_confinement.jsp (last accessed April 21, 2020).

¹¹ See Luke Barr, *Bureau of Prisons coronavirus response under fire: 'Reactive,' not 'proactive,' inmates, staff say*, <https://abcnews.go.com/Health/bureau-prisons-coronavirus-response-fire-reactive-proactive-inmates/story?id=70063263> (last accessed April 21, 2020); see also West Centrals Best, *ACLU Suing FCI Oakdale I For Not Releasing Inmates Fast Enough* (April 6, 2020), <https://abcnews.go.com/Health/bureau-prisons-coronavirus-response-fire-reactive-proactive-inmates/story?id=70063263> (last accessed April 21, 2020).

¹² See ECF No. 345 at p. 11, n.4.

of Alison Johnston Grinter, Esq., which establishes the great lengths Reality and her local, Texas-based counsel took to be sure that BOP received her request for release and to serve the remainder of her sentence in home confinement due to the COVID-19 pandemic. The fact that the BOP claims they have not received it is troubling. But it also epitomizes the BOP's unpreparedness and lack of resources necessary to adequately respond to the unique challenges presented by the COVID-19 pandemic. This unpreparedness and resource issue create additional risk for the facilities and prisoners that have been subrogated to higher priority facilities and prisoners – because it is well documented that all of these facilities are at tremendous risk.¹³

Second, whenever BOP *does* decide to acknowledge Reality's request, the BOP may determine that Reality is not “eligible for home confinement” under the existing statutory tools available to BOP and/or the standards Attorney General Barr's memos establish (including BOP's interpretation of and response thereto).¹⁴ Various comprehensive memoranda have been written to explain the vast limitations on the BOP under the existing framework, including concerns that the requirement for a “minimum” score under the PATTERN assessment and the existence of various categorical, offense-based exclusions may prevent a large number of prisoners from consideration, among other criteria set forth in the Barr memos.¹⁵

Relief from the Court may be the only remedy left at the disposal of prisoners who the BOP determines are not eligible for priority treatment under Attorney General Barr's revised rubric.

¹³ See e.g., **Exhibits A, C, and D**, generally.

¹⁴ See e.g., Memo. from Attorney Gen. William Barr to Director of BOP, *Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic* (Mar. 26, 2020), at <https://www.politico.com/f/?id=00000171-1826-d4a1-ad77-fda671420000>.

¹⁵ See e.g., Brennan Center for Justice at NYU School of Law Center for American Progress, *Expanding BOP's Response to the Novel Coronavirus, and Helping States Safely Reduce their Prison Populations* (April 16, 2020), https://www.brennancenter.org/sites/default/files/2020-04/BC%20Letter%20to%20DOJ%20final_0.pdf (last accessed April 21, 2020), attached hereto as **Exhibit C**; see also Legal Information Services Associates, LLC, Newsletter to Federal Prisoners, dated April 20, 2020, attached hereto as **Exhibit D**.

Notably, experts believe this criteria disqualifies the majority of inmates in the federal prison system from consideration.¹⁶ So, if the BOP determines Reality is ineligible for release into home confinement or if her request is not reviewed by the BOP (i.e., the status quo), her only remedy is via the “catchall provision” of the “compassionate release” statute (i.e., the same statute under which her Motion has been filed), which was recently modified “to expand[] compassionate release ... and expedite [] compassionate release applications.”¹⁷ The legal significance of the recent amendments is discussed in greater detail, *infra*, and in Reality’s original Motion.

Third, **257 additional inmates** have been infected, **198 additional staff** have been infected, and **15 additional inmates have died** since Reality filed her Motion on April 10, 2020.¹⁸ Reality does not have additional time to wait for the BOP to try to locate her paperwork – which was submitted weeks ago. There are now thirty-five (35) reported cases in nearby Fort Worth FMC as the virus spreads like wildfire through Texas,¹⁹ including its first inmate death announced April 22, 2020.²⁰ And although the BOP continues to report just two (2) cases in FMC Carswell,

¹⁶ *Id.* (“[P]eople with a ‘minimum’ score under PATTERN likely comprise a relatively small percentage of the prison population.”) (*citing* Office of the Attorney General, *The First Step Act of 2018: Risk and Needs Assessment System*, U.S. Department of Justice, 2019, 58-62, https://nij.ojp.gov/sites/g/files/xyckuh171/files/media/document/the-first-step-act-of-2018-risk-and-needs-assessment-system_1.pdf) (In the general PATTERN model, 20 percent of people in a sample set used by the DOJ to evaluate the tool received a “minimum score”).

¹⁷ 164 Cong. Rec. S7314-02, 2018 WL 6350790 (Dec. 5, 2018) (statement of Senator Cardin, co-sponsor of the First Step Act).

¹⁸ These and any other aggregate figures presented herein are based on the numbers publicized on BOP’s website, available at, <https://www.bop.gov/coronavirus/>, as of April 21, 2020.

¹⁹ See Federal Bureau of Prisons, COVID-19 Cases, <https://www.bop.gov/coronavirus/> (last accessed on April 21, 2020).

²⁰ See USDOJ BOP Press Release, *Inmate death at FMC Fort Worth* (April 22, 2020), available at https://www.bop.gov/resources/news/pdfs/20200422_press_release_ftw.pdf (last visited April 22, 2020).

these numbers and the circumstances at the facility continue to be questioned (appropriately) by public reporting outlets and inmates.²¹ They may even share staff and resources.

b. The Conditions at FMC Carswell Are Particularly Dangerous.

Mendy Read-Forbes, Inmate No. 22253-031, describes an epidemiological nightmare at FMC Carswell: “We have run out of toilet paper, we have run out of pads...We’ve had no soap for our bathrooms. It is crazy. We get out one time a day for 10 minutes. We walk to the chow hall, we get hot lunch and we come back with bologna every night.”²² The article expounds:

...tensions are high after more than a week without recreation or activities. There are about 250 women in her housing unit but only about 120 chairs...They sleep four to a cell and less than three feet apart. Everyone’s expected to wear the same disposable mask every day. The phones are in pretty heavy use but Forbes hasn’t seen anyone sanitize them...²³

“Basically I just wiped it off on my shirt hoping not to get it. We are not implementing anything that should be implemented,” Forbes said.²⁴

...Even scarier, the unit across the hall was put under quarantine because of a suspected coronavirus case...But officers still move between that quarantined unit and hers...²⁵

“So whatever they’ve got...we’re going have...,” Forbes said.²⁶ “The conditions are bad for us, we’re all really scared, and they aren’t telling us anything.”²⁷

...And earlier this month, KXAS-TV reported that a pregnant inmate in her 30s was rushed from the prison to a hospital for an emergency C-section. She’s now in critical care on a ventilator, but the baby, born premature, was doing well, according to the report...²⁸

²¹ See e.g., Christopher Connelly, ‘We’re All Really Scared’: Life in Federal Lockup Remains Uncertain During COVID-19 Outbreak (April 13, 2020), <https://www.keranews.org/post/were-all-really-scared-life-federal-lockup-remains-uncertain-during-covid-19-outbreak> (last accessed April 21, 2020).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

The Government goes to great lengths to assure the Court that appropriate precautions are being taken, but in truth, the current conditions at FMC Carswell violate the Center for Disease Control's (CDC) well-established social-distancing guidelines – and that's putting it kindly. Reality has reported to counsel various concerns about her current situation including:

- There are four (4) inmates in her cell with her, no more than three (3) feet away from her;
- They are in their cells together approximately eleven (11) hours per day, not including the time they are asleep;
- She was unable to clean the telephone before she used it to speak to counsel, meaning any airborne droplets coughed, sneezed, or exhaled on to the telephone from any prior caller remained on the telephone when it was her turn to use it, only increasing her risk of exposure;
- Her requests for medical prescriptions (Zoloft) have been ignored, in contradiction of the assertion that she is still receiving the medical care she needs in the midst of the BOP's pandemic-induced facility restrictions;
- She has seen people taken out on stretchers, indicating that the BOP's reported number of cases are understated; and
- BOP staff are regularly getting sick, further proving the BOP's reported number of cases are understated. The only plausible explanation for the lack of additional reported cases on the BOP webpage is that BOP is not doing enough testing in the facility or the test results have not come back yet.

Notably, reports like this are surfacing frequently, specifically as it pertains to FMC Carswell, where inmates report that conditions now are “worse than before the lockdown because it is harder to social distance.”²⁹ “‘We are breathing on each other,’ said Sandra Shoulders [Inmate No. 47308-424], who has been at Carswell for two years and has four years left on a drug offense.

²⁹ See also Mark Dent and Kaley Johnson, *Sick, elderly and fearing coronavirus: Life inside Fort Worth's women's federal prison* (April 20, 2020), <https://www.star-telegram.com/news/special-reports/article242042671.html> (last accessed April 21, 2020).

‘It’s four people in a room. It’s very overcrowded, it’s very nasty here.’”³⁰ “‘They are trying to separate us but there is no way to (be) separated because of the overcrowding,’ said inmate Kimberli Himmell [Inmate No. 64708-060] via email, who has stage five kidney failure and stage three breast cancer.”³¹ “Most meals are sack lunch bologna sandwiches...,” “not all of the staff and inmates wear masks, and many of the inmates lack soap or don’t use it.”³²

As set forth in her Motion, these conditions fly in the face of all guidance issued by the CDC and other leading authorities on preventing the spread of COVID-19 and exacerbate Reality’s underlying conditions, making her even more susceptible to the deadly virus that is confirmed present in the facility. As set forth in her original Motion, Ms. Winner is immunocompromised due to her various pre-existing medical conditions now exacerbated by the facility “lockdown.”

Regrettably, the Government argues that Reality should have known what she was signing up for and should have considered her underlying conditions when she entered her plea. Of course, aside from being insensitive, this argument also appears to be disingenuous. Reality was doing well – indeed no infractions or disciplinary issues of any kind – until the COVID-19 pandemic occurred, and her facility was caught off guard and unprepared. One thing Reality did not sign up for is a possible death sentence, or a punitive penalty that may leave her grievously ill. She will, however, agree to any conditions that will allow her to serve the remainder of her sentence in home confinement – in rural Texas, where her family lives, an area conducive to social distancing that has generally escaped serious devastation from COVID-19 – and spare her infection with a virus that has already taken twenty-two (22) inmate lives.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

II. Reality *Did* Submit an Administrative Request, and the BOP’s Mishandling of Her Request Illustrates Why This Court Must Act Now.

On April 8, 2020, Reality submitted not one, but *two*, administrative requests to the Warden at FMC Carswell.³³ Reality made her *first* request on the BOP’s standard form BP-229 for administrative requests with the oversight of Bill Pendergraft, her BOP correctional counselor.³⁴ This request was apparently rejected.³⁵ Reality made her *second* administrative request via a handwritten letter, submitted to her BOP case manager Mary Gruszka.³⁶ Despite these two requests, the BOP and the Government still claim they have no record of her ever making them.³⁷ Mr. Pendergraft and Ms. Gruszka are Reality’s BOP liaisons. Reality has done all that the law requires, and BOP has failed her. This Court cannot wait for a BOP answer or remedy – for Reality’s sake, it must act now.

In his opinion issued on April 13, 2020, widely-respected Judge Rakoff of the Southern District of New York held that having to wait the full thirty days under 18 U.S.C. 3582(c) does not serve the intent and purpose the FSA was to serve in expediting requests:

That the statute gives the defendant this choice [to exhaust administrative remedies or wait 30 days] is crucial to understanding Congress’s intent. Generally, Congress imposes exhaustion requirements in order to “serve[] the twin purposes of protecting administrative agency authority and promoting judicial efficiency.” *McCarthy*, 503 U.S. at 145. But the hybrid requirement in this statute — either exhaust or wait 30 days -- substantially reduces the importance of the first purpose, as it allows a defendant to come to court before the agency has rendered a final decision. Indeed, anyone familiar with the multiple demands that the BOP has faced for many years in this era of mass incarceration can reasonably infer that Congress recognized that there would be many cases where the BOP either could not act within 30 days on such a request or, even if it did act, its review would be superficial. Congress was determined not to let such exigencies interfere with the right of a defendant to be heard in court on his motion for compassionate release, and hence only limited him to 30 days before he could come to court in the ordinary

³³ See **Ex. B** at ¶¶ 8, 11.

³⁴ See *id.* at ¶¶ 6, 9.

³⁵ *Id.* at Ex. C (“The form ... that I filled out was rejected....”).

³⁶ *Id.* at ¶ 8, 10.

³⁷ ECF No. 345 at p. 11, n.4.

course. Thus, the reduction of the wait period to a mere 30 days also “unquestionably reflects” a third purpose, i.e., “congressional intent for the defendant to have the right to a meaningful and prompt judicial determination of whether he should be released.” *United States v. Russo*, No. 16-cr-441 (LJL), ECF No. 54, at 4 (S.D.N.Y. Apr. 3, 2020).³⁸

Therefore, Judge Rakoff appropriately decided he had the discretion to waive 18 U.S.C. 3582(c)’s exhaustion requirement. Otherwise, strict enforcement of the 30-day period would not serve the Congressional objective in light of the COVID-19 pandemic’s “capacity to spread in swift and deadly fashion”.³⁹ The Court should do the sensible thing here and recognize the same: it may waive 18 U.S.C. 3582(c)’s exhaustion requirement and act on Reality’s request.

III. Section 3582(c)’s Administrative Exhaustion Requirement is a Claims-Processing Rule, Not a Jurisdictional Rule.

The Government argues that administrative exhaustion under 18 U.S.C. § 3582(c) is a jurisdictional rule, mandating exhaustion before this Court may consider Reality’s motion. This argument fails. The Section 3582(c)’s administrative exhaustion requirement is a claim-processing rule, as opposed to a jurisdictional precondition, that can be waived.⁴⁰ The U.S. Supreme Court has emphasized the necessity of observing “the important distinctions between jurisdictional prescriptions and claim-processing rules.”⁴¹ Claim-processing rules “seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified

³⁸ *United States v. Haney*, No. 1:19-cr-541-JSR, ECF No. 27 (S.D.N.Y. Apr. 13, 2020).

³⁹ *Id.*

⁴⁰ *See United States v. Brown*, No. 18-cr-56-jdp, ECF No. 59 (W.D.Wi. Apr. 8, 2020) (citing *Bowles v. Russel*, 551 U.S. 205, 211–12 (2007) (noting “the jurisdictional distinction between court-promulgated rules and limits enacted by Congress”)); *Fort Bend Cty., Texas v. Davis*, 139 S. Ct. 1843, 1849 (2019) (“The Court has therefore stressed the distinction between jurisdictional prescriptions and non-jurisdictional claim-processing rules, which seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.”); *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17 (2017) (“Mandatory claim-processing rules are less stern.”).

⁴¹ *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010).

times.”⁴² Because claim-processing rules do not “govern[] a court’s adjudicatory capacity,” they may, in certain cases, be waivable by the parties or by the courts.⁴³

The U.S. Supreme Court has adopted a “bright line” test for when to classify statutory restrictions as jurisdictional.⁴⁴ A rule qualifies as jurisdictional only if “Congress has clearly stated that the rule is jurisdictional.”⁴⁵ “[A]bsent such a clear statement,” the Supreme Court has cautioned, “courts should treat the restriction as nonjurisdictional in character,” with the specific goal of “ward[ing] off profligate use of the term ‘jurisdiction.’”⁴⁶ In considering whether Congress has spoken clearly, courts consider both the language of the statute and its “context, including . . . [past judicial] interpretation[s] of similar provisions.”⁴⁷

While the Eleventh Circuit has not addressed the question of whether the exhaustion requirement in Section 3582(c)(1)(A) is jurisdictional, in a related context it has found with several federal appellate courts that the language of that subsection is non-jurisdictional, in interpreting a different portion of 18 U.S.C. §3582(c).⁴⁸

Accordingly, subsection (c) generally should not be understood to impose jurisdictional requirements. While prior holdings governing compassionate release under earlier versions of the

⁴² *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011).

⁴³ *Id.*

⁴⁴ *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006).

⁴⁵ *Sebelius v. Auburn Reg’l Med. Ctr.*, 568 U.S. 145, 153 (2013).

⁴⁶ *Id.*

⁴⁷ *Reed Elsevier*, 559 U.S. at 168.

⁴⁸ *United States v. Taylor*, 778 F.3d 667, 671 (7th Cir. 2015) (“[Section] 3582 is not part of a jurisdictional portion of the criminal code but part of the chapter dealing generally with sentences of imprisonment. . . [n]or is subsection (c) phrased in jurisdictional terms.”); *see also United States v. Caraballo- Martinez*, 866 F.3d 1233, 1243 (11th Cir. 2017) (considering the Court’s jurisdictional authority to consider successive motions under Section 3582(c)); *United States v. Beard*, 745 F.3d 288, 291 (7th Cir. 2014) (holding Section 3582(c) has no jurisdictional limitation); *United States v. Trujillo*, 713 F.3d 1003, 1005 (9th Cir. 2013) (holding Section 3582(c) has no jurisdictional limitation); *United States v. Weatherspoon*, 696 F.3d 416, 421 (finding no jurisdictional restriction under Section 3582(c)); *see also United States v. Green*, 886 F.3d 1300, 1306 (10th Cir. 2018) (same).

statute may create an ongoing requirement that defendants submit a request to the BOP before filing compassionate release motions on their own, the waiting period the statute prescribes cannot be applied as a jurisdictional requirement.

IV. Reality Does Not Need to Allege a Qualifying Medical Condition to be Eligible for Compassionate Release Under 3582(c).

The Government further argues that Reality should be denied compassionate release because she lacks a qualifying medical condition. This is wrong. Reality reiterates, and incorporates by reference, her arguments from her opening Memorandum as to why this Court is not limited to considering only medical conditions in determining whether extraordinary and compelling circumstances exist for granting her release.⁴⁹

And in any event, her brief establishes that Reality is immunocompromised, one of the enumerated categories of “People Who Are at Higher Risk for Severe Illness”⁵⁰ identified by the CDC in its “Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities.”⁵¹ In other words, she *does* have a qualifying medical condition, as characterized by the CDC, on top of her susceptibility to pneumonia and other presently untreated but well documented mental and physical health issues. To state otherwise, as the Government does, is simply wrong – and yet another example of why it is incumbent upon this Court to act: the Department of Justice and the Bureau of Prisons simply view Reality as a

⁴⁹ See ECF No. 341-1 at p. 5-11.

⁵⁰ CDC Coronavirus Disease 2019 (COVID-19), *People Who Are at Higher Risk for Severe Illness* (April 15, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html> (last accessed April 21, 2020).

⁵¹ CDC Coronavirus Disease 2019 (COVID-19), *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (April 18, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (last accessed April 21, 2020).

“defendant” or a “convict” when this situation compels a more personal review of Reality as a vulnerable human being in a precarious position.

Nonetheless, the real issue the Court faces here is whether it will join the majority of District Courts in this country that recognize the Sentencing Commission’s policy statement is outdated and needs to be updated in light of the FSA.⁵² Or whether it will be on the other side of history and cling to a line of jurisprudence that goes against the current trend of American sentencing law, against the plain language of the statute, and against compassion and common sense in extraordinary circumstances.

CONCLUSION

For the foregoing reasons, this Court should grant Reality “compassionate release” under 18 U.S.C. § 3583(c)(1)(A) and allow her to serve the remainder of her sentence at home with her family in light of the COVID-19 pandemic. Moreover, and notwithstanding this Court’s denial of Reality’s request to expedite the briefing of her Motion – a request many other District Courts have appropriately granted in view of the exigency of the circumstances – Reality respectfully requests that this Court expedite its ruling, especially in light of the Government’s “there’s nothing to see here” position and in view of the well-documented and herein-demonstrated inaction by the BOP.

Respectfully submitted,

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⁵² *Id.* at p. 7.

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REALITY LEIGH WINNER**

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2020, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which sent notification of such filing to counsel of record for all parties.

/s/ Joe D. Whitley
Joe D. Whitley

Federal Public & Community Defenders
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April 1, 2020

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

Dear Attorney General Barr:

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

On March 19, 2020, we wrote to you to warn that our jails and prisons were in “grave and imminent danger.”¹ We urged you to take “immediate and decisive action” to address the impending spread of COVID-19 among incarcerated persons.² That same day, the Bureau of Prisons (BOP) confirmed the first presumed-positive COVID-19 cases in the federal prison system.³

Despite our warnings—and those of Congress, policy groups, and public health and legal experts—the Department of Justice (DOJ) has failed to respond appropriately to this global pandemic. Instead, DOJ’s response rests on its view that that “many inmates will be safer in BOP facilities.”⁴ DOJ has relied on this false premise to oppose release in a wide range of cases, and as the foundation of policies such as your March 26, 2020, “Memorandum for Director of Bureau Prisons.” (“March 26 Policy”).⁵ That policy fails to take advantage of DOJ’s existing tools to transfer

¹ Letter from David Patton, et al., Co-Chair of the Federal Public & Community Defenders Legislative Committee, to Hon. William P. Barr, Atty. Gen. 3 (Mar. 19, 2020) (“Defender Letter”).

² *Id.*

³ See Cassidy McDonald, *Federal Prison Workers Say Conflicting Orders on Coronavirus Response is Putting Lives at Risk*, CBS News (Mar. 19, 2020), <https://www.cbsnews.com/news/coronavirus-prison-federal-employees-say-conflicting-orders-putting-lives-at-risk-2020-03-19/> (“*Conflicting Orders on Coronavirus Response*”).

⁴ Memorandum from Hon. William P. Barr, Atty. Gen. to Michael Carvajal, Director of the Bureau of Prisons 1 (Mar. 26, 2020), <https://www.politico.com/f/?id=00000171-1826-d4a1-ad77-fda671420000>.

⁵ See *id.*; see also *id.* at 2 (directing a discretionary factor for transfer to home confinement be “verification that the conditions under which the inmate would be confined upon release would present a lower risk of contracting COVID-19 than the inmate would face in his or her BOP facility,” and “[w]e should not grant home confinement to inmates when doing so is likely to increase their risk of contracting COVID-19.”).

vulnerable and low-risk inmates quickly to home confinement.⁶ Instead, it erects a complex set of procedural and logistical hurdles to home confinement.⁷ These hurdles are largely arbitrary, bear little nexus to the current public health crisis, and will disparately harm persons of color. This inadequate response to COVID-19 continues to endanger the individuals who live and work in BOP facilities.

You now have the authority, under the CARES Act, to allow BOP to transfer many more people to the relative safety of home confinement.⁸ But you have not made the finding necessary to allow BOP to do so.⁹ Instead, yesterday BOP announced a new plan (“Phase 5”) that amounts to no more than a 14-day lockdown for all federal prisoners.¹⁰ It is certain to fail. The real problem—as public health experts agree—is that there are simply too many people in the prisons. The only rational, humane response to this crisis is to greatly reduce the prison population. Locking people down in institutions with inadequate medical care and poor sanitation is not the answer.

This past Saturday, March 28, 2020, marked a grim milestone. Patrick Estell Jones, 49, became the first individual in BOP custody to die of COVID-19.¹¹ He was serving a sentence in a low-security facility for a non-violent crack cocaine offense.¹² His death will surely not be the last. The day after Mr. Jones’s death, the Washington Post reported that 30 more inmates and staff at Oakdale had tested positive for COVID-19.¹³ The numbers of positive-COVID-19 cases in BOP are beginning to exponentially escalate: on March 27, 2020, BOP’s website reported a total of 18 COVID-19 positive

⁶ See Defender Letter, at 5-6; Letter from Hon. Jerrold Nadler, Chairman, H. Comm. on the Judiciary & Hon. Karen Bass, Chair, Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, to Hon. William P. Barr, Atty. Gen. 2-5 (Mar. 30, 2020); Letter from Hon. Richard J. Durbin, U.S. Senator et al., to Hon. William P. Barr, Atty. Gen. 1-2 (Mar. 23, 2020); Letter from Hon. Kamala D. Harris, U.S. Senator, to Michael Carvajal, Director, Fed. Bureau of Prisons 1 (Mar. 19, 2020). See also Letter from Hon. Elizabeth Warren, U.S. Senator et al., to Michael Carvajal, Director, Fed. Bureau of Prisons (Mar. 20, 2020).

⁷ See Timothy Williams et al., *Jails Are Petri Dishes: Inmates Freed as the Virus Spreads Behind Bars*, NY Times (Mar. 30, 2020), <https://www.nytimes.com/2020/03/30/us/coronavirus-prisons-jails.html> (“*Jails Are Petri Dishes?*”).

⁸ See *Coronavirus Aid, Relief, and Economic Security Act*, H.R. 748 § 6002 at Div. B, Tit. II, Sec. 12003(b)(2) (2020) (“CARES Act”) (requiring you to make this finding in order to broaden BOP’s authority to release individuals to home confinement).

⁹ *Id.*

¹⁰ See Fed. Bureau of Prisons, *BOP – COVID-19 Action Plan: Phase 5*, https://www.bop.gov/resources/news/20200331_covid19_action_plan_5.jsp (last visited Apr. 1, 2020).

¹¹ See Sarah N. Lynch, *Prisoner Serving Time For Drug Charge is First U.S. Inmate to Die from COVID-19*, Reuters (Mar. 28, 2020), <https://www.reuters.com/article/us-health-coronavirus-prison-death/federal-inmate-serving-time-for-drug-charge-is-first-inmate-to-die-from-covid-19-idUSKBN21G04T>.

¹² See *id.*; see also Motion for Sentence Reduction Under Section 404 of the First Step Act, *United States v. Patrick Estell Jones*, No. 07-CR-022-ADA (W.D. Tex. Nov. 1, 2019), ECF No. 182, at 7, 16, 21.

¹³ See Kimberly Kindy, *An Explosion of Coronavirus Cases Cripples Federal Prison in Louisiana*, Wash. Post (Mar. 29, 2020), https://www.washingtonpost.com/national/an-explosion-of-coronavirus-cases-cripples-a-federal-prison-in-louisiana/2020/03/29/75a465c0-71d5-11ea-85cb-8670579b863d_story.html (“*Explosions of Coronavirus Cases?*”).

inmates and staff;¹⁴ today, it reports 59 confirmed cases.¹⁵ There are increasing reports of positive diagnoses of individuals detained in federal pretrial custody by the United States Marshals Service.¹⁶ These diagnoses are “almost certainly an undercount.”¹⁷

Many in the federal prison population are at grave risk of severe illness or death. There are approximately 10,000 individuals over the age of 60 presently in federal custody, and one third of all individuals in BOP custody have preexisting conditions.¹⁸ But there are measures that DOJ can take now to avert catastrophe. We urge you to immediately reduce the number of people entering federal detention and aggressively transfer or release individuals who are already incarcerated into the community.

A. Jails and Prisons are Unprepared and Unsafe. Experts Agree that Rapid Decarceration is Necessary to Prevent a Deadly COVID-19 Outbreak.

DOJ’s claim that individuals are safer in BOP facilities than in the community is contradicted by the realities of institutional confinement, BOP’s documented failure to provide adequate care, and the consensus of public health experts that decarceration is necessary to slow COVID-19’s transmission.

Even in the best of times, prisons and jails have “long been known to be associated with high transmission probabilities of infectious diseases.”¹⁹ Incarcerated individuals “are at special risk of infection” and “infection control is challenging.”²⁰ Prisons and jails “contain high concentrations of people in close proximity and are breeding grounds for uncontrolled transmission [of infection].”²¹

¹⁴ See Fed. Bureau of Prisons, *BOP: COVID-19 Update Web Archive* (Mar. 27, 2020), <https://web.archive.org/web/20200327045124/https://www.bop.gov/coronavirus/> (last visited Mar. 31, 2020).

¹⁵ See Fed. Bureau of Prisons, *BOP: COVID-19 Update*, <https://www.bop.gov/coronavirus/> (last visited Apr. 1, 2020).

¹⁶ See Seth Freed Wessler, *The Coronavirus Has Spread to the US Marshals’ Detention Empire*, Mother Jones (Apr. 1, 2020), <https://www.motherjones.com/politics/2020/04/us-marshals-coronavirus-pretrial-detainees/>.

¹⁷ See Williams, *Jails Are Petri Dishes*; see also Walter Palvo, *Bureau of Prisons Underreporting COVID-19 Outbreaks in Prison*, Forbes (Apr. 1, 2020), <https://www.forbes.com/sites/walterpavlo/2020/04/01/bureau-of-prisons-underreporting-outbreaks-in-prison/#3e4556d7ba32>.

¹⁸ See *U.S. Indictment of Venezuelan President Maduro Transcript: William Barr Speech*, Rev.com, 53:19 (Mar. 27, 2020), <https://www.rev.com/blog/transcripts/u-s-indictment-of-venezuelan-president-maduro-transcript-william-barr-speech> (“Barr Transcript”).

¹⁹ Letter from Patricia Davidson, Dean, Johns Hopkins School of Nursing, et al., to Hon. Larry Hogan, Governor of Maryland (Mar. 25, 2020), <https://bioethics.jhu.edu/wp-content/uploads/2019/10/Johns-Hopkins-faculty-letter-on-COVID-19-jails-and-prisons.pdf> (co-signed by over 200 faculty members of Johns Hopkins Bloomberg School of Public Health, School of Nursing, and School of Medicine) (“Johns Hopkins Letter”).

²⁰ Open Letter from Gregg S. Gonsalves, Assistant Professor, Department of Epidemiology of Microbial Diseases, Yale School of Public Health, et al. to Vice President Mike Pence and Other Federal, State and Local Leaders 4 (Mar. 2, 2020), https://law.yale.edu/sites/default/files/area/center/ghjp/documents/final_covid-19_letter_from_public_health_and_legal_experts.pdf (co-signed by 814 experts in public health, law and human rights); see also Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 *Clinical Infectious Diseases* 1047-155 (2007), <https://doi.org/10.1086/521910>.

²¹ Letter from Dr. Sandro Galea, Dean, Boston University School of Public Health, et al., to President Trump 1 (Mar. 27, 2020), <https://thejusticecollaborative.com/wp-content/uploads/2020/03/Public-Health-Expert-Letter-to->

Incarcerated individuals share bathrooms, sinks, and showers. They eat together, and sleep in close proximity to each other. They often lack access to basic hygiene items, much less the ability to regularly disinfect their living quarters.²² “The conditions and reality of incarceration makes prisons and jails tinderboxes for the spread of disease.”²³ In short, “our jails are petri dishes.”²⁴

BOP is not exempt from this reality. A 2015 Bureau of Justice Statistics report found that persons incarcerated in state and federal prisons and jails were more likely than the general population to have a chronic condition or an infectious disease.²⁵ And BOP and its staff have acknowledged that infection control is difficult in the prison setting.²⁶ BOP facilities remain overcrowded. Low, medium, and high facilities are all operating at overcapacity and BOP’s total inmate population exceeds the rated capacity of its prisons by an average of 12 to 19 percent.²⁷ Simply put, CDC recommendations such as social distancing are “impossible to achieve in our federal prisons and immigration facilities as things currently stand.”²⁸ Locking people in their cells for the next 14 days will not change this fact.

Indeed, BOP has proven incapable of protecting the people within its walls—even on an ordinary day.²⁹ In 2016, DOJ’s Office of Inspector General (OIG) found that BOP experienced chronic

Trump.pdf (co-signed by numerous public health officials from leading medical and public health institutions) (“Public Health Experts’ Letter”).

²² See e.g., David Patton, Exec. Director, *Statement from Federal Defenders of New York*, Federal Defenders of New York (Mar. 8, 2020), <https://federaldefendersny.org/about-us/news/statement-from-federal-defenders-of-new-york.html>; Public Health Experts’ Letter, at 1; Williams, *Jails Are Petri Dishes*; Brie Williams et al., *Correctional Facilities in the Shadow of COVID-19: Unique Challenges and Proposed Solutions*, Health Affairs Blog (Mar. 26, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200324.784502/full/> (“*Unique Challenges*”); see also Keegan Hamilton, *Sick Staff, Inmate Transfers, and No Tests How the U.S. is Failing Federal Inmates as Coronavirus Hits*, Vice (Mar. 24, 2020) https://www.vice.com/en_us/article/jge4vg/sick-staff-inmate-transfers-and-no-tests-how-the-us-is-failing-federal-inmates-as-coronavirus-hits (“*Sick Staff*”) (noting access to hand sanitizer varies by facility).

²³ Kindy, *Explosions of Coronavirus Cases* (quoting Udi Ofer, director of the American Civil Liberties Union’s Justice Division).

²⁴ Williams, *Jails Are Petri Dishes*.

²⁵ See Laura M. Maruschak et al., *Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-2012*, U.S. Dep’t of Justice, Ofc. of Justice Programs, Bureau of Justice Statistics (Rev. Oct. 4, 2016), <https://www.bjs.gov/content/pub/pdf/mpsfpi1112.pdf>.

²⁶ See Fed. Bureau of Prisons, *Program Statement 6190.04: Infectious Disease Management* (Jun. 3, 2014), https://www.bop.gov/policy/progstat/6190_004.pdf; Williams, *Jails Are Petri Dishes*; Hamilton, *Sick Staff*; see also Barr Transcript, at 48:57.

²⁷ See Fed. Bureau of Prisons, *Federal Bureau of Prisons Program Fact Sheet* (rev. July 31, 2019), https://www.bop.gov/about/statistics/docs/program_fact_sheet_20191004.pdf; see also U.S. Dep’t of Justice, *FY2020 Performance Budget Congressional Submission Federal Prison Systems Buildings and Facilities 3*, <https://www.justice.gov/jmd/page/file/1144631/download> (last visited Apr. 1, 2020).

²⁸ Public Health Experts’ Letter, at 1.

²⁹ See, e.g., 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> (“*Medical Staffing Challenges*”); U.S. Dep’t of Justice

medical staff shortages and failed to take adequate measures to address them, endangering the safety and security of its institutions.³⁰ From 2010 to 2014, BOP's total medical staff was "approximately 17 percent less than what the BOP projected was necessary to provide what it considers to be 'ideal' care," and 12 institutions were so medically understaffed that they were described as "crisis level."³¹ Lack of adequate staffing has resulted in medical personnel and other non-correctional staff working as guards,³² and has made wait times for individuals to receive even routine medical care unacceptably long.³³

Moreover, BOP's care for its rapidly aging population—a population that is at grave risk for complications from COVID-19—has been woefully inept.³⁴ According to OIG, BOP lacks appropriate staffing levels and infrastructure to address the needs of aging inmates.³⁵ Overcrowding prevents BOP from placing aging individuals in facilities that best address their medical needs.³⁶ Aging persons could wait years for routine medical equipment like eyeglasses or dentures.³⁷ These overcrowded and understaffed facilities cannot provide routine care on a good day, let alone during a global pandemic.

A chorus of public health experts has confirmed that immediate decarceration is necessary to avoid a humanitarian crisis in our prisons and jails.³⁸ Correctional experts agree, warning that "America's 7,000 jails, prisons, juvenile and immigration detention centers are completely unequipped to handle

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> ("Aging Inmate Population").

³⁰ *Medical Staffing Challenges*, at i, 1-2.

³¹ *Id.* at 1.

³² See *Oversight of the Federal Bureau of Prisons and Implementation of the First Step Act of 2018: Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 115th Cong. 2-4 (2019) (statement of Kathleen Hawk Sawyer, Director, Fed. Bureau of Prisons), <https://docs.house.gov/meetings/JU/JU08/20191017/110089/HHRG-116-JU08-Wstate-SawyerK-20191017.pdf>; Hamilton, *Sick Staff*.

³³ See *Aging Inmate Population*, at 17-19.

³⁴ See Centers of Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): People Who Are At Higher Risk for Severe Illness*, <https://bit.ly/2vgUt1P> (last visited Mar. 31, 2020).

³⁵ See *Aging Inmate Population*, at i-ii.

³⁶ See *id.* at 25-26.

³⁷ See *id.* at 17-19. One incarcerated individual requested dentures in 2010 and had still not received them when he was interviewed by OIG years later. He said "this makes it extremely hard to eat because he cannot chew food." *Id.* at 18. Another aging person had waited two years for an eye examination and was using a magnifying glass in the interim. *Id.* at 19.

³⁸ See, e.g., *Public Health Experts' Letter*, at 1; *Johns Hopkins Letter*, at 2-3; *Unique Challenges*, at 5; *Preparedness, Prevention and Control of COVID-19 in Prisons and Other Places of Detention: Interim Guidance*, World Health Organization 4 (Mar. 15, 2020), http://www.euro.who.int/__data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf?ua=1.

this pandemic,”³⁹ and absent swift action, we will “see devastation that is unbelievable.”⁴⁰ DOJ must heed these warnings now.

Sadly, we know what will happen if DOJ declines to act. Rikers Island, a New York State correctional institution, did not heed expert advice to rapidly reduce its prison population.⁴¹ COVID-19 has infected the institution at an exponential rate:⁴² Rikers now suffers an infection rate that is seven times higher than the rest of New York City and is seventy-five times higher than the United States.⁴³ Rikers is no outlier. The Cook County jail in Chicago went from two positive COVID-19 cases to 101 confirmed cases in a week.⁴⁴ The progression of COVID-19 in these facilities is a bellwether of what will come if DOJ does not swiftly decarcerate.

B. DOJ’s Claims in Court that its Jails and Prisons are Safe during the COVID-19 Pandemic are False.

In pleadings across the country, federal prosecutors have assured courts not only that the situation in BOP facilities is under control, but that detention in BOP facilities is safer than release to the community.⁴⁵ Across jurisdictions, and regardless of the facility in question, DOJ’s arguments are the

³⁹ Robin McDowell & Margie Mason, *Locked up: No Masks, Sanitizer as Virus Spreads Behind Bars*, APNews / SFGate (Mar. 29, 2020), <https://www.sfgate.com/news/medical/article/Fear-behind-bars-as-the-coronavirus-spreads-15163433.php>.

⁴⁰ David Montgomery, *Prisons are Bacteria Factories; Elderly Most at Risk*, Stateline, PewTrusts (Mar. 25, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/03/25/prisons-are-bacteria-factories-elderly-most-at-risk>.

⁴¹ See Jean Casella & Katie Rose Quandt, *US Jails Will Become Death Traps in the Coronavirus Pandemic*, The Guardian (Mar. 30, 2020), <https://www.theguardian.com/commentisfree/2020/mar/30/jails-coronavirus-us-rikers-island> (“From a public health and public safety standpoint, the solution to this crisis is quite simple: let them go.”).

⁴² See, e.g., Katie Shepard, *Trapped on Rikers’: Jails and Prisons Face Coronavirus Catastrophe as Officials Slowly Authorize Releases*, Wash. Post (Mar. 23, 2020), <https://www.washingtonpost.com/nation/2020/03/23/coronavirus-rikers-island-releases/> (noting that the chief physician for Rikers Island warned “a storm is coming . . . We have told you who is at risk. Please let as many people out as you possibly can.”); Chelsea Rose Marcius, *Coronavirus Has Left Nearly 800 Inmates Quarantined in NYC Jails*, New York Daily News (Mar. 29, 2020), <https://www.nydailynews.com/coronavirus/ny-coronavirus-quarantine-inmates-city-jails-rikers-island-20200329-r4ozbsavc5c35bhkqk6zuwm35y-story.html>; see also Meagan Flynn, *Top Doctor at Rikers Island Calls the Jail a Public Health Disaster Unfolding Before our Eyes*, Wash. Post (Mar. 31, 2020), <https://www.washingtonpost.com/nation/2020/03/31/rikers-island-coronavirus-spread/>.

⁴³ See The Legal Aid Society, *COVID-19 Infection Tracking in NYC Jails*, <https://legalaidnyc.org/covid-19-infection-tracking-in-nyc-jails/> (last visited Mar. 29, 2020). The infection rate in Rikers is also exponentially higher than the rates in Wuhan, China and Lombardy, Italy.

⁴⁴ See Williams, *Jails are Petri Dishes?*

⁴⁵ See, e.g., Gov’t’s Resp. to Def.’s Mot. for Temporary Release, *United States v. Michael Calvert*, No. 19-cr-40068 (D. Kan. Mar. 17, 2020), ECF No. 146, at 4 (“In other words, the defendant is essentially quarantined from the public. However, he contends that it is necessary and compelling to leave that environment to live in the public where the risk of contracting the virus is arguably higher.”); Gov’t’s Resp. in Opp. to Def.’s Emergency Mot. for Pretrial Release, *United States v. Jermain French*, No. 19-cr-00946 (N.D. Ill. Mar. 25, 2020), ECF No. 33, at 14-15 (“Defendant erroneously presumes that his risk of contracting COVID-19 is greater in custody than out; but currently defendant is in a detention facility where no known instances of the virus are present, where social contact with the outside world is suspended, and apparently where entrants (staff and inmates) to the facility are screened and measures to isolate high-risk individuals are in progress, compared to the general public in Illinois, where the risk of contracting the virus is arguably higher.”); Gov’t’s Opp. to Def.’s Mot. to Amend Conditions of Release, *United States v. Tabares-Salinas*, No. 20-cr-437 (S.D. Cal.

same: it asserts that its jails and prisons have comprehensive precautionary measures in place to prevent the transmission of COVID-19, and in any case, are well-equipped to deliver care. These representations are demonstrably false. BOP's modified operations policy, even as written, is woefully inadequate.⁴⁶ And BOP staff, including correctional officers, have publicly reported dangerous and unhygienic conditions across the country.⁴⁷ Incarcerated individuals and staff have filed multiple lawsuits that set forth failures within these facilities in stark detail.⁴⁸

BOP's modified operations are facially insufficient and—as the increasing number of positive cases demonstrate—all but ensure the rapid transmission of COVID-19 within its facilities.⁴⁹ The protocol is deficient in several ways. First, the modified operations do not sufficiently address pre-symptomatic spread of COVID-19 among staffers, contractors, and inmates. For example, only BOP staff at medical referral centers or in areas of the country with “sustained community transmission” are subjected to “[e]nhanced screening.” And this “enhanced screening” only requires temperature checks and self-reporting—it does not require staff to disclose whether they have been in high risk areas or venues or exposed to other symptomatic people. Since most COVID-19 transmission occurs pre-symptomatically, and some people show no symptoms at all, these

Mar. 19, 2020), ECF No. 12, at 2 (arguing that the “speculation” of an outbreak at the detainee’s facility “is both unsubstantiated and unwarranted: there are no known cases of COVID-19 at the facility and no evidence that the facility’s staff is unprepared to address such cases if they should arise”).

⁴⁶ See Fed. Bureau of Prisons, *Implementing Modified Operations*, https://www.bop.gov/coronavirus/covid19_status.jsp (last visited on March 31, 2020).

⁴⁷ See, e.g., Mitch Smith, et al., *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times (Mar. 29, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last visited Mar. 30, 2020) (“*Coronavirus in the U.S.*”); Kindy, *An Explosion of Coronavirus Cases*; Hamilton, *Sick Staff*; Darius Jaafari, *Federal Government Said it Halted Prison Transfers. They’re Still Happening*, PA Post (Mar. 23, 2020), <https://papost.org/2020/03/23/federal-government-said-it-halted-prison-transfers-theyre-still-happening/>; McDonald, *Conflicting Orders on Coronavirus Response*.

⁴⁸ See Maxine Bernstein, *Federal Prison Workers File Suit Seeking Hazardous Pay After Guards Exposed to Coronavirus in Louisiana Lockup*, The Oregonian (Mar. 30, 2020), <https://bit.ly/2yr3pTD> (BOP correctional officers from Oregon and Louisiana are named plaintiffs in a lawsuit that “alleges federal employees have been working in close proximity to people and surfaces infected with the novel coronavirus without sufficient protective gear since Jan. 27 and continue to do so.”); Williams, *Jails are Petri Dishes* (“[A] lawsuit filed late Friday asked the federal court in Brooklyn to order the immediate release of about 540 federal prisoners there identified as ‘particularly vulnerable’ to the virus because of their age or underlying health conditions.”); see also The Public Defender Service, *PDS Publications & Legal Resources, Banks v. Booth—Challenging Life-Threatening Lack of COVID-19 Precautions at the D.C. Jail*, available at <https://bit.ly/3bDbYsD> (filings for a lawsuit brought by a class of incarcerated persons in the custody of a facility that also houses individuals in federal pretrial custody).

⁴⁹ See Fed. Bureau of Prisons, *Implementing Modified Operations*, https://www.bop.gov/coronavirus/covid19_status.jsp (last visited on Mar. 31, 2020).

“enhanced screenings” are simply inadequate.⁵⁰ The screening tool used for prison contractors is similarly defective.⁵¹

In any case, BOP’s own staff reports that the agency is failing to respond to COVID-19 in its facilities. The accounts are staggering: the New York Times “spoke[] with more than a dozen workers in the Bureau of Prisons,” who reported that “federal prisons are ill-prepared for a coronavirus outbreak. Many lack basic supplies like masks, hand sanitizer, and soap.”⁵² A BOP employee in Atlanta explained that staff does not have enough gloves, masks, or other supplies to respond to this outbreak. Nor do they “have enough space to properly quarantine inmates.”⁵³ Staff at FCI Tallahassee, a low-security facility, described a potential outbreak as “mass chaos,” and confirmed that BOP is “just not prepared to handle something of that nature.”⁵⁴ And a union representative at FCI Oakdale recounted that BOP was slow to shut down a prison labor program in

⁵⁰ See European Centre for Disease Prevention and Control, *Rapid Risk Assessment: Coronavirus Disease 2019 (COVID-19) Pandemic: Increased Transmission in the EU/EEA and the UK – Seventh Update* (Mar. 25, 2020), <https://www.ecdc.europa.eu/en/publications-data/rapid-risk-assessment-coronavirus-disease-2019-covid-19-pandemic> (“[t]he proportion of pre-symptomatic transmission [has been] estimated to be around 48% to 62%”); see also Sam Whitehead, *CDC Director on Models For the Months to Come: ‘This Virus is Going to Be With Us,’* NPR (Mar. 31, 2020), <https://www.npr.org/sections/health-shots/2020/03/31/824155179/cdc-director-on-models-for-the-months-to-come-this-virus-is-going-to-be-with-us> (“[W]e have pretty much confirmed [] that a significant number of individuals that are infected actually remain asymptomatic. That may be as many as 25%.”).

⁵¹ See Fed. Bureau of Prisons, *Visitor/Volunteer/Contractor COVID-19 Screening Tool*, https://www.bop.gov/coronavirus/docs/covid19_screening_tool.pdf (last visited Apr. 1, 2020); For example, the contractor screening tool asks contractors whether they have traveled to several foreign locations including South Korea (9,887 confirmed cases), or Japan (2,178 confirmed cases) in the last 14 days. It does not bother to screen for those who have traveled to, for instance, Spain (102,136 cases), Germany (72,383 cases), or elsewhere in the United States (189,633 cases). See *COVID-19 Map – Johns Hopkins Coronavirus Resource Center*, Johns Hopkins University & Medicine, <https://coronavirus.jhu.edu/map.html> (last visited Apr. 1, 2020). This tool also fails to screen for pre-symptomatic spread or whether contractors are practicing social distancing.

BOP provides conflicting information about inmate screening. It claims to require all newly admitted asymptomatic inmates to be quarantined for at least 14 days. See Fed. Bureau of Prisons, *BOP – COVID-19 Action Plan: Phase 5*, https://www.bop.gov/resources/news/20200331_covid19_action_plan_5.jsp (last visited Apr. 1, 2020) (Background on Phases 1-4). But the inmate screening tool does not reflect this process: instead directing staff to conduct “normal intake” so long as an inmate has not traveled to a CDC-determined risk location or had close contact with anyone diagnosed with COVID-19 in the last 14 days. See Fed. Bureau of Prisons, *Coronavirus Disease 2019 (COVID-19) Inmate Screening Tool*, https://www.bop.gov/coronavirus/docs/covid19_inmate_screening_tool_20200202.pdf (last visited Apr. 1, 2020). Phase 5 of BOP’s COVID-19 Action Plan, effective today, purports to significantly decrease inmate movement by requiring that incarcerated individuals at every institution be “secured in their assigned cells/quarters.” See *BOP – COVID-19 Action Plan: Phase Five*, https://www.bop.gov/resources/news/20200331_covid19_action_plan_5.jsp. But this plan does not appear to correct the defective screenings of staff, contractors or inmates, nor does it change the reality that individuals remain in close quarters—still sharing living space, bathrooms, showers, laundry, recreation areas, and computer and phone access.

⁵² Smith, *Coronavirus in the U.S.*

⁵³ *Id.*

⁵⁴ Hamilton, *Sick Staff*.

the facility; the program was not shut down until after an inmate tested positive for COVID-19. Now, “people [keep] getting sick back to back to back to back.”⁵⁵

C. The March 26 Policy Erects Complex Barriers that Unnecessarily Limit Transfers to the Relative Safety of Home Confinement.

The most tragic aspect of the impending medical disaster within BOP is that DOJ has ample statutory authority to return people to the community through home confinement, as opposed to incarceration. Our hopes when you announced a memorandum to BOP to “increase the use of home confinement,”⁵⁶ were dashed upon reading the March 26 Policy itself. Rather than increase the use of home confinement, the policy erects unnecessary barriers to—and sets arbitrary criteria for prioritizing access to—the relative safety of home confinement.

Congress has repeatedly directed DOJ to use home confinement expansively in response to the COVID-19 crisis.⁵⁷ Well before this pandemic, Congress issued in the First Step Act multiple statutory directives calling for BOP to make broad use of its home confinement authorities.⁵⁸ In April 2019, BOP directed staff to comply with these directives without qualification.⁵⁹ Last week, Congress unanimously passed, and President Trump signed into law, the Coronavirus Aid, Relief, and Economic Security Act, or the “CARES Act.”⁶⁰ The CARES Act broadens your authority, and that of BOP, to place individuals on home confinement. On Monday, March 29, 2020, House Judiciary Committee Chairman Jerrold Nadler and Subcommittee on Crime Chairwoman Karen Bass urged you to “use every tool at your disposal to release as many prisoners as possible, to protect them from COVID-19.”⁶¹

Instead of exercising your authority under the CARES Act and finding that the COVID-19 pandemic is “materially affect[ing] the functioning of BOP,”⁶² you have rested on your assertion

⁵⁵ Kindy, *An Explosion of Coronavirus Cases*.

⁵⁶ Barr Transcript.

⁵⁷ See Press Release, U.S. Senator Dick Durbin, *Durbin, Grassley, Colleagues Press Trump Administration to Transfer Vulnerable Inmates to Home Confinement* (Mar. 23, 2020), <https://bit.ly/2xGxLAN>; Press Release, H. Comm. on the Judiciary, *After Rising Numbers of Federal Prisoners Test Positive for COVID-19 & First COVID-19 related Death Reported in Federal Prison, Nadler & Bass Renew Call for DOJ to Take Action* (Mar. 30, 2020), <https://bit.ly/2xIFQ87>; Press Release, H. Comm. on the Judiciary, *Nadler & Bass Demand Answers from DOJ About Federal Bureau of Prisons & U.S. Marshals Service Response to Coronavirus* (Mar. 19, 2020), <https://bit.ly/2JvvJGo>; Press Release, H. Comm. on the Judiciary, *Chairman Nadler Asks DOJ About BOP & U.S. Marshals Service Response to Coronavirus & Seeks Answers Regarding Health & Safety of Those in Federal Prisons* (Mar. 12, 2020), <https://bit.ly/2UuX4z0>; Press Release, U.S. Senator Kamala Harris, *Harris Demands Information on Coronavirus Preparedness in Federal Prisons* (Mar. 5, 2020), <https://bit.ly/33YGL0t>.

⁵⁸ See Defender Letter at 5, n. 16.

⁵⁹ See Fed. Bureau of Prisons, Operations Memorandum: 001-2019 at 2, Home Confinement (Apr. 4, 2019).

⁶⁰ See H.R. 748 § 6002 at Div. B, Tit. II, Sec. 12003(b)(2).

⁶¹ Press Release, H. Comm. on the Judiciary, *After Rising Numbers of Federal Prisoners Test Positive for COVID-19 & First COVID-19 related Death Reported in Federal Prison, Nadler & Bass Renew Call for DOJ to Take Action* (Mar. 30, 2020).

⁶² CARES Act at § 12003(b)(2).

that “many inmates will be safer in BOP facilities where the population is controlled and there is ready access to doctors and medical care.” This is a false narrative with catastrophic consequences. Based on this premise, your Policy imposes the upside-down requirement that BOP determine “for each individual inmate” that “transfer to home confinement is likely not to increase the inmate’s risk of contracting COVID-19.” In light of the incontestable evidence, there should be a presumption that home confinement is the safest option for all. Moreover, this upside-down requirement is impractical. It defies reason to believe that BOP’s already understaffed medical departments—likely increasingly overtaxed by the COVID-19 crisis—will be able to swiftly conduct this calculus on an individualized basis.⁶³

The March 26 Policy also imposes an arbitrary hierarchy for access to safety that lacks a nexus to public health. For example, you direct BOP staff to give “priority treatment” to inmates who score as “minimum” risk under BOP’s risk-assessment tool, PATTERN. Chairman Nadler and Subcommittee Chair Bass immediately objected to your use of PATTERN in this manner, warning that it was “created for an entirely different purpose,” and “is still an incomplete tool.”⁶⁴ We agree with them on these points, as well as their concerns about “possible racial/ethnic and gender bias” associated with the tool. Indeed, the only publicly reported data on the demographic impact of PATTERN confirms that its use here will have a racially disparate impact on black males. DOJ’s data shows that black males are far less likely than white males to have a PATTERN score that puts them in the “minimum” category: only 7% of black men score as minimum risk, compared with 30%—almost one third—of white men.⁶⁵

Also arbitrary and divorced from any valid public health or public safety consideration is the March 26 Policy’s direction to deprioritize “inmates . . . who have incurred a BOP violation within the last year.” But an individual can receive a BOP violation for innocuous conduct, such as smoking where prohibited or using abusive or obscene language.⁶⁶ Moreover, the arbitrariness of receiving a BOP violation is exacerbated by the minimal due process in BOP disciplinary actions and the likely varied enforcement practices from one BOP facility to another.

We also are concerned that the March 26 Policy deems individuals “ineligible” for home confinement based on “some offenses.”⁶⁷ You do not disclose what is included on this list of “ineligible” offenses. This is a new and significant limitation on home confinement that is neither statutorily mandated, nor articulated in existing BOP policy. Neither the First Step Act’s directive that BOP “place prisoners with lower risk levels and lower needs on home confinement for the

⁶³ See Memo from Emily Galvin-Almanza, Senior Legal Counsel, The Justice Collaborative, *Re: Barr BOP Memo*, (Mar. 26, 2020), <https://thejusticecollaborative.com/wp-content/uploads/2020/03/TJC-Response-Home-Confinement-Memo-Mar-2020.pdf>.

⁶⁴ Press Release, H. Comm. on the Judiciary, *Nadler & Bass Renew Call for DOJ to Take Action*, at 4.

⁶⁵ See U.S. Dep’t of Just., *The First Step Act of 2018: Risk and Needs Assessment System* 62, tbl. 8 (2019) (“DOJ Report”) (reporting 29.7% of white males in the developmental sample fall in the minimum risk category while only 7% of black males fall in that same category).

⁶⁶ See Dep’t of Justice, Bureau of Prisons, *Inmate Discipline Program*, Program Statement 5270.09, tbl. 1, (July 8, 2011).

⁶⁷ March 26 Policy at 2.

maximum amount of time permitted,” nor the CARES Act expansion of the amount of time permitted, exclude any inmate from consideration for home confinement. There is no constitutional or statutory authority for DOJ to “play[] roulette with people’s lives” because of their offense of conviction.⁶⁸ “Imprisonment is meant to punish by restricting liberty, not by exposure to illness.”⁶⁹

Finally, the March 26 Policy directs BOP to place any individual into a “14-day quarantine period” before that individual is discharged from BOP. The very reason that prisons are so unsafe during a pandemic is because of the inability to safely quarantine patients. The Washington Post has reported that at FCI Oakdale, “all . . . prison staff have now been exposed to the virus.”⁷⁰ We agree that measures should be taken to ensure medical care and safe housing for at-risk individuals upon exit from BOP. But under no circumstances should their time in BOP custody be extended for an illusory “quarantine” that will have dangerous consequences for individuals, the facility where they are detained, and the surrounding community.

The COVID-19 pandemic 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

cc: Mr. Michael Carvajal, Director, Federal Bureau of Prisons

⁶⁸ Williams, *Jails are Petri Dishes.*

⁶⁹ Rachel Barkow, *Our Leaders Have the Power to Release People in Prison. Now they Must Use It* (Mar. 27, 2020), <https://bit.ly/3dP5Ak7>.

⁷⁰ Kindy, *An Explosion of Coronavirus Cases.*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

UNITED STATES OF AMERICA

*
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*
*
*
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*
*

v.

NO. 1:17-CR-00034

REALITY LEIGH WINNER

* * * * *

DECLARATION OF ALISON JOHNSTON GRINTER, ESQ.

I, Alison Johnston Grinter, Esq., pursuant to 28 U.S.C. § 1746 hereby declare, under penalty of perjury:

1. I am an attorney in private practice working almost exclusively in the criminal courts. I also keep a docket of pro-bono civil rights cases through Legal Access Texas, as well as several other community civil rights groups. My office address is currently (as we are all sheltering in place) 6738 Old Settlers Way, Dallas, Texas 75236
2. I am an attorney-at-law admitted in and in good standing to practice before the courts of the State of Texas and the US District Courts for the Northern District of Texas. I was licensed to practice on November 4, 2005, and my bar number with the State of Texas is 24043476.
3. I submit this declaration in connection with my position as local counsel to Defendant Reality Leigh Winner (“Ms. Winner”) in relation to the above-captioned case.
4. The facts set forth below are based upon my personal experience and knowledge. I will supplement this declaration if additional information becomes available during the pendency of the case.

5. On April 3, 2020, I mailed a copy of the Bureau of Prisons (“BOP”) Form BP-229 (“Request for Administrative Remedy”), a true and correct copy of which is attached hereto as **Exhibit A**, to Ms. Winner, who is currently an inmate (Registered Number 22056-021) at FMC Carswell located at 3000 I St, Fort Worth, TX 76127, for her execution and submission to the BOP via the Warden of FMC Carswell requesting that she be permitted to serve the remainder of her sentence in home confinement due to underlying medical conditions that make her particularly susceptible to the COVID-19 virus that is infiltrating the federal prison system and, in particular, FMC Carswell.
6. On the same day, April 3, 2020 at 10:11 AM CDT, I also personally emailed Ms. Winner’s Correctional Counselor, Bill L. Pendergraft, an attachment of the form and notifying him that I needed Ms. Winner to have access to the form. He responded on April 6 at 7:23 AM CDT that he would present Ms. Winner with a copy of the form. A true and correct copy of my email correspondence with Mr. Pendergraft is attached hereto as **Exhibit B**.
7. It is my understanding that Ms. Winner’s counsel of record from the law firm Baker, Donelson, Bearman, Caldwell and Berkowitz, PC, Matthew S. Chester, Esq., also discussed the form with Ms. Winner by telephone, on or around April 3, 2020, and in the days prior and subsequent thereto, to explain the form to her and how it would need to be submitted.
8. I was informed by Ms. Winner on April 9, 2020, that she had submitted the completed form as well as a second hand-written letter addressed to the Warden of FMC Carswell, which was hand-delivered to Ms. Winner’s assigned case manager, Ms. Mary Gruszka, who accepted the letter and assured Ms. Winner that she would deliver it to the appropriate prison officials at approximately 3:10 PM, Central Time, on April 8, 2020.

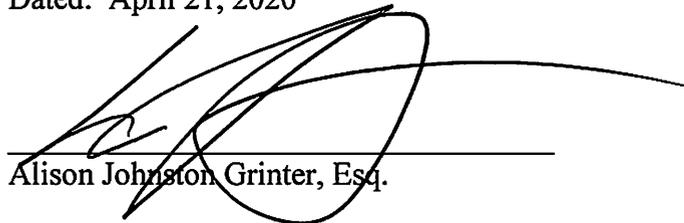
A true and correct copy of the correspondence received from Ms. Winner confirming these details is attached hereto as **Exhibit C**.¹

9. Notably, although BOP apparently rejected the first form submission, it is my understanding based on communications with Mr. Pendergraft (her BOP assigned Correctional Counselor) that he provided Ms. Winner with the form that she ultimately used, understanding her intentions to file a request for release into home confinement as contemplated by 18 U.S.C. § 3582(c)(1)(A)(i).
10. Nonetheless, Ms. Winner has confirmed via both written and verbal communications (most recently to Mr. Matt Chester) that BOP's staff-member and agent, Ms. Mary Gruszka, acknowledged and accepted the same substantive request made via letter addressed to the Warden of FMC Carswell and assured its safe passage.
11. I disagree with the assertion in the Government Opposition Brief [*see* Rec. Doc. No. 345, n.4] suggesting that Ms. Winner has not actually submitted a request to the Warden of FMC Carswell. In fact, I respectfully submit that she has submitted two. Further, she has made multiple BOP staff aware of her request. One such staff member provided the form that she used, and the other promised to deliver her request to the Warden.

¹ In an extreme abundance of caution, and without waiving the attorney-client privilege, I am providing the limited communication received directly from Ms. Winner upon which these statements are based, as it is my understanding that the communication was provided solely to establish proof of submission and the chain of custody in relation to her request, which has now been called into question by the *Government's Response In Opposition to Defendant's Motion for Compassionate Release Under 18 U.S.C. §(c)(1)(A) as Amended by the First Step Act of 2018* [Rec. Doc. No. 351] ("**Government Opposition Brief**"). Ms. Winner's notes and recollection made contemporaneous with her submission is the best evidence of these facts available at present, especially in light of the present inability for counsel to visit Ms. Winner at her facility due to COVID-19 related restrictions. This evidence directly contradicts the Government's statements.

12. I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge, information and belief.

Dated: April 21, 2020



A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right. The signature is written over a horizontal line.

Alison Johnston Grinter, Esq.

Exhibit A

Federal Bureau of Prisons

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From:

LAST NAME, FIRST, MIDDLE INITIAL

REG. NO.

UNIT

INSTITUTION

Part A- INMATE REQUEST

DATE

SIGNATURE OF REQUESTER

Part B- RESPONSE

DATE

WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER:

CASE NUMBER:

Part C- RECEIPT

Return to:

LAST NAME, FIRST, MIDDLE INITIAL

REG. NO.

UNIT

INSTITUTION

SUBJECT:

DATE

RECIPIENT'S SIGNATURE (STAFF MEMBER)



Exhibit B



Alison Grinter <alisongrinter@gmail.com>

Ms. Winner - legal issue

3 messages

Alison Grinter <alisongrinter@gmail.com>
To: Bill Pendergraft <bpendergraft@bop.gov>

Fri, Apr 3, 2020 at 10:11 AM

Hi Mr. Pendergraft,
we're going to be filing a motion in the district court for Reality Winner to be have compassionate release. As I understand it, she first has to apply internally with the grievance form and be denied (I mean, we'd also be thrilled if the warden just released her, but I understand). My question to you is, can you provide her with the form or should I mail one to her? I thought I'd check before just in case y'all have these around.

Thanks,

Alison Grinter,
Attorney and Counselor
(214) 704-6400 (cell)

Board Certified Criminal Law Specialist

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 **US_Bureau_of_Prisons_Blank_Grievance_Forms_BP-9_BP-10_BP-11 (1).pdf**
59K

Bill Pendergraft <BPendergraft@bop.gov>
To: Alison Grinter <alisongrinter@gmail.com>

Mon, Apr 6, 2020 at 7:23 AM

yes, I'll provide her with administrative remedy forms

Bill L. Pendergraft
Correctional Counselor
P.O. BOX 27066
"J" Street Bldg. 3000
Fort Worth, Texas 76127
(817) 782-4241 (office)
(817) 782-4250 (Fax)
B.Pendergraft@bop.gov

>>> Alison Grinter <alisongrinter@gmail.com> 4/3/2020 10:11 AM >>>
[Quoted text hidden]

Alison Grinter <alisongrinter@gmail.com>
To: Bill Pendergraft <BPendergraft@bop.gov>

Thu, Apr 16, 2020 at 4:49 PM

Hi Mr. Pendergraft,
I hope you're well. I need to set up a legal call with Ms. Winner. When do you think we can schedule it?

Thanks,

**Alison Grinter,
Attorney and Counselor
(214) 704-6400 (cell)**

Board Certified Criminal Law Specialist

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[Quoted text hidden]

Exhibit C

Alison Grinter

From: WINNER REALITY LEIGH (22056021)
Sent Date: Tuesday, April 7, 2020 7:05 PM
To: Alisongrinter@gmail.com
Subject: HEY

HAY

I have the form. If you need another field trip with the kids, I might need an extra in case I mess this one up. Thank you so much I can't believe it got here so fast! :)



<3RE

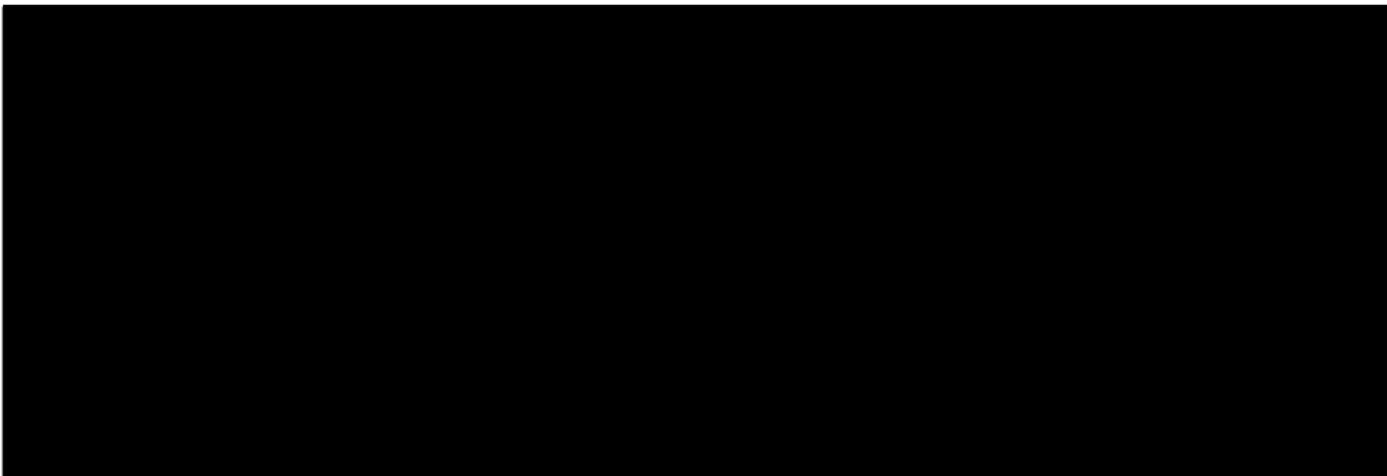
Alison Grinter

From: WINNER REALITY LEIGH (22056021)
Sent Date: Wednesday, April 8, 2020 3:49 PM
To: Alisongrinter@gmail.com
Subject: RE: RE: HEY

The form you sent in that I filled out was rejected and being the wrong form for this purpose. Therefore, I had a hand-written letter with the same statement ready just in case :) I asked if it could be delivered to the warden. Ms. M. Gruszka, my assigned Case Manager, accepted the letter and assured me she would get it to him. This happened at 3:10 pm, central time, on 8 April 2020.

I will let Matt Chester know next time he calls, or if you could, let him know that I've sent the request. I don't have him on Corrlincs anymore because I can only have 30 friends on this version of Facebook at a time. :)

<3RE



REALITY LEIGH WINNER on 4/7/2020 7:05:55 PM wrote
HAY

I have the form. If you need another field trip with the kids, I might need an extra in case I mess this one up. Thank you so much I can't believe it got here so fast! :)



<3RE

BRENNAN CENTER FOR JUSTICE

April 16, 2020

Hon. William P. Barr
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Re: Expanding BOP's Response to the Novel Coronavirus, and Helping States Safely Reduce their Prison Populations

Dear Attorney General Barr:

We write to ask that the Department of Justice (“DOJ”) take a leadership role in helping the nation’s criminal justice systems adapt to the challenges presented by the novel coronavirus.

America’s prisons and jails present unique health dangers,¹ and are especially vulnerable to the spread of infectious disease² — problems that the outbreak of the novel coronavirus throw into sharp relief.³ Absent additional interventions, COVID-19 will continue spreading through incarcerated populations, and our nation’s correctional officers and staff, at an alarming rate.⁴

We thank you for the steps you have taken to respond to this crisis, including expanding the use of home confinement by the Bureau of Prisons (“BOP”). As you acknowledge, the BOP has a “profound obligation to protect the health and safety of all inmates” requires nothing less.⁵ Yet more must be done to stop the spread of the novel coronavirus behind bars. Even if the BOP’s recent lockdown slows transmission among people who remain imprisoned in its facilities, it will also stretch tensions behind bars even further. And, correctional administrators nationwide face similar pressures.⁶

¹ Michael Massoglia & Brianna Remster, “Linkages Between Incarceration and Health,” *Public Health Reports* 134, no. 1 (2019): 8S-14S, <https://journals.sagepub.com/doi/epub/10.1177/0033354919826563> (“incarceration is associated with worse health for all formerly incarcerated persons compared with never incarcerated persons”).

² See, e.g., David Cloud, *On Life Support: Public Health in the Age of Mass Incarceration*, Vera Institute of Justice, 2014, 12 <https://www.vera.org/publications/on-life-support> (noting an example of the rapid spread of drug-resistant tuberculosis behind bars).

³ See Daniel A. Gross, “It Spreads Like Wildfire: The Coronavirus Comes to New York’s Prisons,” *The New Yorker*, March 24, 2020, <https://www.newyorker.com/news/news-desk/it-spreads-like-wildfire-covid-19-comes-to-new-yorks-prisons>.

⁴ Lauren-Brooke Eisen, “How Coronavirus Could Affect U.S. Jails and Prisons,” *Brennan Center for Justice*, March 13, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/how-coronavirus-could-affect-us-jails-and-prisons>.

⁵ Memorandum from Attorney General William P. Barr to Director of the Federal Bureau of Prisons Michael Carvajal, April 3, 2020, Office of the Attorney General, 1, <https://www.politico.com/f/?id=00000171-4255-d6b1-a3f1-c6d51b810000>.

⁶ The BOP ordered a 14-day lockdown on March 31, 2020. Federal Bureau of Prisons, “Bureau of Prisons COVID-19 Action Plan: Phase Five,” March 31, 2020, https://www.bop.gov/resources/news/pdfs/20200331_press_release_action_plan_5.pdf. As similar measures are

We therefore urge you to take two important steps. First, we ask that you expand the use of home confinement even further, as detailed below.

Second, the DOJ can encourage states to respond more proactively to this crisis. We therefore ask that you circulate a “Dear Colleague” letter among state criminal justice stakeholders — including governors, prosecutors, judges, correctional administrators, and public defenders — urging them to work together to adopt policies to limit the virus’s impact. Those policies should include (1) releasing people from prison who do not pose a public safety threat, thus decreasing population density and viral transmission risk; and (2) improving health behind bars by making hygiene products and medical services broadly available. This guidance would underscore the federal government’s commitment to zealously confronting a threat to the wellbeing of imprisoned people and those who work in correctional institutions nationwide.

We explain both proposals below. Thank you for your attention to this important matter.

I. The DOJ Should Continue Expanding the Use of Home Confinement.

First, we urge you to use your authority under the CARES Act to its maximum effect. Under ordinary circumstances, the BOP can transfer people to home confinement for “10 percent of the term of imprisonment,” or six months — whichever is shorter.⁷ The CARES Act provides for a significant expansion of this authority if the Attorney General concludes that “emergency conditions will materially affect the functioning of” the prison system.⁸

Your April 3rd memorandum makes that finding and broadens home confinement eligibility to include “all at-risk inmates,” starting with those in facilities hit hardest by the virus.⁹ But the memorandum recommends that transfer decisions continue to be “guided by” the factors listed in your March 26th memorandum.¹⁰ Several criteria from that earlier memorandum could unnecessarily limit the reach of the newly expanded home confinement authority.¹¹ We therefore urge you to revisit and revise March 26th guidance as follows:¹²

implemented nationwide, at least one nonviolent protest has broken out in a state correctional facility, and “signs of stress” are emerging elsewhere. Keri Blakinger, “Coronavirus Restrictions Stoke Tensions in Lock-Ups Across U.S.,” *The Marshall Project*, April 2, 2020, <https://www.themarshallproject.org/2020/04/02/coronavirus-restrictions-stoke-tensions-in-lock-ups-across-u-s>.

⁷ 18 U.S.C. § 3624(e)(2).

⁸ Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 12003(a)(2), (b)(2), 134 Stat. 281, 515-16 (2020).

⁹ Barr April 3 memorandum, 2.

¹⁰ Barr April 3 memorandum, 2. For the criteria themselves, see Memorandum from Attorney General William P. Barr to Director of the Federal Bureau of Prisons Michael Carvajal, March 26, 2020, Office of the Attorney General, 1-2, <https://www.politico.com/f/?id=00000171-1826-d4a1-ad77-fda671420000>.

¹¹ Defense attorneys have described at length other recommended changes to these criteria. Letter from David Patton et al. to Attorney General William P. Barr, April 1, 2020, https://www.fd.org/sites/default/files/covid19/other_resources/defender_letter_ag_barr_re_covid-19_4-1-20.pdf; Letter from David Patton et al. to Attorney General William P. Barr, March 19, 2020, <https://sentencing.typepad.com/files/20200319-letter-to-ag-barr-et-al-re-covid-19.pdf>.

¹² Some have already noted, correctly, that leaving the March 26th guidance in place sends “mixed messages” to BOP administrators. Lisa Freeland et al., “We’ll See Many More Covid-19 Deaths in Prison if Barr and Congress Don’t Act Now,” *Washington Post*, April 6, 2020, <https://www.washingtonpost.com/opinions/2020/04/06/covid-19s-threat-prisons-argues-releasing-at-risk-offenders>.

- First, your March 26th memorandum asks the BOP to prioritize transfers of imprisoned people who have a “minimum” risk of recidivating according to PATTERN, the risk and needs assessment tool created by the First Step Act.¹³ However, people with a “minimum” score under PATTERN likely comprise a relatively small percentage of the prison population.¹⁴ And as we have previously written, PATTERN is an imperfect system, one that relies on a broad definition of recidivism that may overstate the actual risk of reoffending, and may also perpetuate racial disparities.¹⁵ Even if the BOP makes decisions “guided by” a person’s PATTERN score, at-risk people should not be denied transfer based substantially on a “score” assigned to them by an unproven and arguably flawed tool that was not designed for this purpose.
- Relatedly, categorical, offense-based exclusions prevent administrators from making the individualized determinations called for when evaluating people for transfer to home confinement.

We also ask that you move quickly to address serious implementation issues in the newly expanded home confinement program. Reports from family members describe people having their transfers revoked at the last moment, and healthy people being quarantined in the same unit as those suspected of having COVID-19.¹⁶

Lastly, it is well established that recidivism drops sharply with age — and the BOP should bear this fact in mind when making release decisions about the more than 10,000 people in federal prison who are over the age of 61.¹⁷ The BOP could consider establishing a presumption of transfer for people of advanced age who, for whatever reason, do not qualify for other programs (such as compassionate release).

¹³ Barr March 26 memorandum, 2, <https://www.politico.com/f/?id=00000171-1826-d4a1-ad77-fda671420000>.

¹⁴ In the general PATTERN model, 20 percent of people in a sample set used by the DOJ to evaluate the tool received a “minimum” score. Just 7 percent of Black men received a “minimum” score. Office of the Attorney General, *The First Step Act of 2018: Risk and Needs Assessment System*, U.S. Department of Justice, 2019, 58-62, https://nij.ojp.gov/sites/g/files/xyckuh171/files/media/document/the-first-step-act-of-2018-risk-and-needs-assessment-system_1.pdf.

¹⁵ See Letter from Ames C. Grawert to David B. Muhlhausen, Ph.D., September 3, 2019, 2-5, <https://www.brennancenter.org/our-work/research-reports/brennan-centers-public-comment-first-step-acts-risk-and-needs-assessment>. The DOJ considered revising PATTERN to narrow its definition of recidivism, but ultimately declined to do so, citing a lack of “access to accurate and complete data for case dispositions.” The DOJ also claims to have revised PATTERN to reduce racial disparities, but has yet to offer data to fully support that claim. Office of the Attorney General, *The First Step Act of 2018: Risk and Needs Assessment System — Update*, U.S. Department of Justice, 2020, 8-11, 13-14, <https://nij.ojp.gov/sites/g/files/xyckuh171/files/media/document/the-first-step-act-of-2018-risk-and-needs-assessment-system-updated.pdf>.

¹⁶ Josh Gerstein, “U.S. Prisons’ Virus-Related Release Policies Prompt Confusion,” *Politico*, Apr. 10, 2020, <https://www.politico.com/news/2020/04/10/us-prisons-virus-related-release-policies-prompt-confusion-178691>.

¹⁷ The U.S. Sentencing Commission found that “offenders over sixty years old at the time of release had a recidivism rate of 16.0 percent,” sharply lower than the general population. *Recidivism Among Federal Offenders: A Comprehensive Overview*, U.S. Sentencing Commission, 2016, 5, 23 & n.56, <https://www.uscc.gov/research/research-reports/recidivism-among-federal-offenders-comprehensive-overview>. For the number of vulnerable people behind bars, see Nathan James & Michael A. Foster, *Federal Prisoners and COVID-19: Background and Authorities to Grant Release*, Congressional Research Service, Report. No. R46297, 2020, 4, <https://crsreports.congress.gov/product/pdf/R/R46297>.

II. The DOJ Should Encourage Criminal Justice Stakeholders to Safely Reduce their Prison Populations and Improve Hygiene Behind Bars.

Next, we ask that you circulate a “Dear Colleague” letter to key state policymakers, offering guidance and best practices on how to safely reduce state prison populations and improve prison hygiene. Recipients should include, but need not be limited to, governors, probation and parole officials, state chief judges, attorneys general, prosecuting attorneys, correctional administrators, and public defenders. Consistent with DOJ policy, this letter would be limited to offering “non-binding advice on technical issues” and express the DOJ’s commitment to safeguarding the safety and civil rights of imprisoned people and those who work in correctional facilities.¹⁸

The health challenges faced by the BOP are not unique to federal prisons. Fortunately, several states have already risen to the occasion, taking steps that range from a temporary halt on prison commitments to early releases.¹⁹ Drawing on these examples, your letter could encourage state decisionmakers to take the following steps:

Expand compassionate release programs.

Like the federal system, many states provide opportunities for people who are sick or older to be released from incarceration early.²⁰ The authority to grant such “compassionate release” varies widely by state. While some are lenient, others require people to meet a relatively narrow set of criteria.²¹ We ask that you encourage state decisionmakers to, wherever possible, work together to cut through the “red tape” limiting compassionate release in their jurisdictions, and ensure that this relief is offered as broadly as possible under state law. Administrators should focus on releasing people who are especially vulnerable to COVID-19 due to their age or preexisting health conditions.

Release people nearing the end of their sentence.

Research indicates that many prison sentences are longer than necessary to achieve public safety goals.²² Even under the best conditions, the final months or even years of imprisonment may not serve any legitimate deterrent or punitive purpose. With the outbreak of COVID-19,

¹⁸ DOJ policy forbids issuing guidance documents that impose affirmative legal obligations or serve “as a substitute for rulemaking,” but expressly permits the issuance of technical guidance such as the letter envisioned here. See Memorandum from Attorney General Jeff Sessions to All Components, November 16, 2017, Office of the Attorney General <https://www.justice.gov/opa/press-release/file/1012271/download>. Statutes reflecting the DOJ’s mandate to safeguard the safety and civil rights of imprisoned people include, but are not limited to, the Civil Rights of Institutionalized Persons Act of 1980. See 42 U.S.C. § 1997a.

¹⁹ See “Reducing Jail and Prison Populations During the Covid-19 Pandemic,” Brennan Center for Justice, March 27, 2020, last modified April 1, 2020, <https://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic>.

²⁰ For more on federal early release programs, see James & Foster, *Federal Prisoners and COVID-19*, 10-13.

²¹ See Mary Price, *Compassionate Release in the States*, FAMM Foundation, 2018, 13, 17, <https://famm.org/our-work/compassionate-release/everywhere-and-nowhere>.

²² See Lauren-Brooke Eisen et al, *How Many Americans Are Unnecessarily Incarcerated?*, Brennan Center for Justice, 2016, 8, 35-41, <https://www.brennancenter.org/our-work/research-reports/how-many-americans-are-unnecessarily-incarcerated>.

the diminishing marginal benefits of those final months of imprisonment must be contrasted with the increasing *risks* associated with prolonged incarceration. Every day behind bars means another day of elevated exposure to a potentially deadly disease.

Acknowledging that new calculus, we ask that you advise state policymakers to use every available policy tool to cut short prison sentences that are already nearing their end. Depending on state and local law, authorities may be able to accomplish this goal by expanding merit-time credits or accelerating parole hearings. Your letter should specifically encourage authorities to think creatively about their legislative and regulatory options. Cooperation across agencies may enable people to more aggressively confront this crisis.

Work with prosecutors to delay prison commitments.

We note that the DOJ recently changed its pretrial detention policy, encouraging federal prosecutors to “consider the medical risks associated with individuals being remanded into federal custody during the COVID-19 pandemic,” and “consider not seeking [pretrial] detention to the same degree we would under normal circumstances.” This step will help people avoid the elevated infection risk associated with incarceration.²³ We urge you to recommend that states adopt similar guidelines.

Many people who have been convicted of crimes but not yet sentenced remain in the community or detained in a local jail. Depending on state law, correctional administrators may be able to suspend new prison commitments on their own authority, keeping these people out of the prison system for the duration of the pandemic.²⁴ But even if they lack the authority to take this step on their own, state prison administrators could work with judges, defense attorneys, and prosecutors to delay sentencing proceedings, effectively postponing rather than forfeiting the right to seek a prison sentence. State prosecutors could also be encouraged to agree to motions seeking release from jail pending sentencing, and work with judges to set appropriate release conditions for people receiving such relief.²⁵

²³ Memorandum from Attorney General William P. Barr to All Heads of Departments and All United States Attorneys, April 6, 2020, Office of the Attorney General, 2 <https://www.justice.gov/file/1266901/download>.

²⁴ See Emmanuel Camarillo, “Illinois Prisons Halt Admissions from County Jails to Slow Spread of Coronavirus,” *Chicago Sun-Times*, March 26, 2020, <https://chicago.suntimes.com/2020/3/26/21196581/illinois-prisons-coronavirus-halt-admissions>.

²⁵ See, e.g., N.Y. CRIM. PROC. L. § 530.45(1) (permitting judges to, upon application of the defendant, set less restrictive release conditions “before sentencing” in certain cases and for certain offenses); ME. STAT. tit. 15, § 1051(1) (permitting someone convicted of a crime to apply for bail “pending imposition of sentence”).

In cooperation with private vendors, waive commissary charges for hygiene products, waive fees for phone calls and other forms of communication, and suspend copays for medical services for the duration of the crisis.

For many people behind bars, soap and hand sanitizers are unavailable, or are luxuries that they simply cannot afford, placing the entire prison system at greater risk of infection.²⁶ To address this problem, we recommend that you urge state correctional administrators to suspend all commissary charges related to soap and personal hygiene products for the duration of the pandemic. This policy change can reduce disease transmission at very little cost to states. Arizona, Minnesota, and Pennsylvania have already taken similar steps.²⁷ Your guidance should recommend that other states follow their example.

With in-person visitation canceled across the country, imprisoned people and their families face incredible stress, aggravated by uncertainty about safety and health behind bars and the difficulty of staying in touch with each other. We therefore ask that you also encourage states to, in cooperation with private vendors, completely suspend charges for mail, phone calls, and video communication for the duration of this crisis. Some vendors, such as JPay, have already begun offering specific services at reduced prices.²⁸ These are important first steps, but (in many cases) still leave cost barriers between families and their increasingly isolated loved ones behind bars. Thankfully, the BOP recently made video visitation and phone calls free to all people in its custody.²⁹ We ask that you encourage states to do the same.

Lastly, state prisons must provide free healthcare to imprisoned people throughout this crisis. Free medical care will encourage quick diagnosis and treatment and help halt the further spread of infection. Thankfully, according to one source, at least forty-seven states now provide free medical care to imprisoned people with COVID-19 symptoms.³⁰ We ask that you urge the remaining three states — Delaware, Hawaii, and Nevada — to follow their example.

Some of these recommendations should also be implemented in the federal system. We have heard that the BOP waived its prohibition on alcohol-based hand sanitizers, but others have reported commissary spending caps that interfere with purchasing hygiene products, limited

²⁶ Conor Friedersdorf, “Can’t We at Least Give Prisoners Soap?,” *The Atlantic*, April 1, 2020, <https://www.theatlantic.com/ideas/archive/2020/04/make-soap-free-prisons/609202/>; Eisen, “How Coronavirus Could Affect U.S. Jails and Prisons”; Keri Blakinger & Beth Schwartzapfel, “When Purell is Contraband, How Do You Contain Coronavirus?,” *The Marshall Project*, March 6, 2020, <https://www.themarshallproject.org/2020/03/06/when-purell-is-contraband-how-do-you-contain-coronavirus>.

²⁷ See “Reducing Jail and Prison Populations During the Covid-19 Pandemic,” Brennan Center for Justice, March 27, 2020, last modified April 13, 2020, <https://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic>.

²⁸ See “CDCR, GTL, JPay Expand Communication Access,” *California Department of Corrections and Rehabilitation*, last modified March 30, 2020, <https://www.cdcr.ca.gov/covid19/cdcr-gtl-jpay-expand-communication-access>; “PRESS RELEASE: Department of Corrections Negotiates Free Calls and Reduced Digital Costs for Incarcerated Population,” *Washington Department of Corrections*, last modified March 20, 2020, <https://www.doc.wa.gov/news/2020/03202020p.htm>.

²⁹ Josh Hendel, “Federal Prisons Make Inmate Calling, Video Visits Free During Pandemic,” *Politico*, April 14, 2020, <https://www.politico.com/news/2020/04/14/federal-prisons-make-inmate-calling-free-186383>.

³⁰ “Responses to the COVID-19 Pandemic,” Prison Policy Initiative, last modified April 14, 2020, <https://www.prisonpolicy.org/virus/virusresponse.html>.

opportunities for cleaning living spaces during the lockdown, and poor access to cleaning and protective supplies for correctional officers and imprisoned people alike.³¹ Such poor conditions will surely contribute to the spread of COVID-19.

* * * * *

Over the past month, the Department of Justice has taken important steps to limit the impact of the novel coronavirus on the health and safety of those held in and working in our correctional system. We ask that you continue to adapt to these challenging circumstances and lead the nation's law enforcement agencies in developing their response.

Respectfully,

Brennan Center for Justice at NYU School of Law

Center for American Progress

#cut50

FAMM

FreedomWorks

Justice Action Network

National Association of Criminal Defense Lawyers

R Street Institute

³¹ See Sadie Gurman et al., "Coronavirus Puts a Prison Under Siege," *Wall Street Journal*, April 6, 2020, <https://www.wsj.com/articles/inside-oakdale-prison-our-sentences-have-turned-into-death-sentences-11586191030?mod=searchresults&page=1&pos=1>.

NEWSLETTER TO FEDERAL PRISONERS

This is a copy of the newsletter sent on April 20th to our 8,000 subscribers in the federal prison system.



BOP Director Says, “We’re Doing Pretty Good” Fighting COVID-19, But Reports Call Results “Tragic” – LISA Newsletter for April 20, 2020

LISA publishes a free newsletter sent every Monday to inmate subscribers in the Federal system.

Edited by Thomas L. Root, M.A., J.D.

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Standards

Former Judges Urge 3rd Circuit to Back Off *Raia* Decision



BOP COVID-19 CURVE NOT FLATTENING

The Federal Bureau of Prisons is now in “Phase 6” of its plan to curb the spread of COVID-19 among its 172,000 inmates housed in 122 institutions and among its 30,000 staff members. As Forbes magazine put it last Wednesday, “BOP’s efforts thus far have included halting social and legal visits since the middle of March, screening of inmates, staff and contractors by taking their temperature to measure infection, mobilizing administrative staff to step into front line positions, increase rate of hiring new corrections officers and halting staff training. The results have been tragic.”

As of Apr 19, there are 495 inmates (up 41% from last week) and 305 staff (up 61% from last week) ill with COVID-19 in 45 institutions (more than one-third of all BOP facilities). At least 22 inmates have died, the latest at FCI Terminal Island yesterday. Reportedly, a BOP case manager from USP Atlanta died last week in her home of COVID-19.

The federal government’s COVID-19 strategy has been to “flatten the curve,” to spread out the spike in coronavirus cases so as not to overwhelm hospital capacity and resources. But, as Forbes notes, no epidemiologists “ever envisioned the systemic failure that would expose 177,000 inmates housed in multiple institutional clusters, some numbering over 5,000 inmates, to a COVID-19 outbreak. These failures are resulting from a lack of a widespread testing protocol at institutions, the continued transfer of inmates between institutions, the introduction of new inmates who are either arrested or self-surrender and the thousands of staff and contractors that go in and out of these institutions.”

The problem that has led to the continuing skyrocketing BOP COVID-19 cases is simple: the BOP has been unable or unwilling to test any inmates “except those who have died or are willing to risk fellow inmate retribution by revealing themselves to be symptomatic. Forbes reports that “more inmates are sick than the BOP is reporting and more inmates are not reporting that they are sick out of fear of being identified as sick.”

This is probably so. As of Sunday night, FCI Elkton reports 50 inmates sick with COVID-19. But last Friday, the BOP admitted in federal court that it had 207 suspected inmate COVID-19 cases, but only had ever received 80 test kits. It has used 37, leaving only 43 on hand. It expects to receive an additional 25 kits a week for the next several weeks.

The Northwest Arkansas Democrat Gazette released emails last Monday in which Arkansas health officials discussed whether the BOP fully understood the “seriousness” of the coronavirus outbreak at the FCI Forrest City, and whether they were fully cooperating with the mitigation effort. The released emails show that shortly after the first positive COVID-19 case at the FCI was disclosed on Friday, April 3, the Arkansas Department of Health director for infectious diseases questioned the prison’s efforts and expressed a desire for CDC backup.

The BOP has almost no ability to test. “We have very, very limited amounts of the testing kits,” Brandy Moore, secretary treasurer of the national union that represents correctional officers in federal prisons,

was quoted as saying by Mother Jones magazine.

At FCC Terre Haute, “we have between 2,500 and 3,000 inmates, and we were given four tests,” Steve Markle, another leader of the national union who works at the prison, told Mother Jones in late March. At FCI Oakdale, correctional officers were told to stop testing people and just assume that anyone with symptoms had been infected, according to Ronald Morris, president of the local union there.

All of this, Mother Jones reported, “is to say that statistics reported by the Federal Bureau of Prisons are likely massive undercounts. “Our numbers are not going to be adequate because we’re not truly testing them,” Moore said.

Meanwhile, in a filing in the EDNY last Monday, the BOP admitted that “‘because of the shortage of tests, testing is currently reserved for those meeting’ certain criteria, including the kind of symptoms the inmate is facing, his potential exposure, whether he is high risk and whether he works in a high-contact role such as food service.” Through Thursday, April 16, the number of inmates tested at MCC New York and MDC Brooklyn has risen from 11 to 19. That is out of a combined population of over 2,300 inmates.

The ACLU has brought lawsuits against FCI Oakdale, FMC Devens, and FCI Elkton, seeking to compel release of more inmates because of the virus. “Devens – one of only seven federal prison medical centers – is a powder keg of potential infection and death from COVID-19, to an even greater degree than nursing homes, cruise ships, and other prisons, sites of some of the most intense clusters of mortality in Massachusetts, the United States, and elsewhere in the world,” the plaintiffs’ lawyers wrote in the Devens complaint.

Perhaps the most sobering report last week came from the Santa Barbara Independent, which reported that Efrem Stutson was released on April 1st and put on a bus to San Bernardino by USP Lompoc officials while he had a hacking cough and was so ill “he could hardly hold his head up.” Efrem refused to go to the hospital that night, but the next morning his family insisted. Doctors diagnosed him with COVID-19 and put him in quarantine. No visitors were allowed. Four days later, Efrem died.

His sisters are furious, the Independent reported. “Why did they release him so sick?” one asked. “They sent him home on his deathbed.”

A USP Lompoc spokesman said, “All inmates, prior to releasing from the BOP, will be screened by medical staff for COVID-19 symptoms. If symptomatic for COVID-19, the institution will notify the local health authorities in the location where the inmate is releasing, and transportation that will minimize exposure will be used, and inmates will be supplied a mask to wear.”

“We’re dealing with [COVID] just as well as anybody else,” BOP Director Michael Carvajal told CNN a week ago, “and I’d be proud to say we’re doing pretty good.”

Forbes, Federal Bureau of Prisons Institutions Not Showing Any Signs of “Flattening Curve” (Apr 15)

Business Insider, The Federal Bureau of Prisons has confirmed the first staff death linked to the coronavirus, report says (Apr 18)

Wilson v Williams, Case No. 4:20cv794 (ND Ohio), Supplement to Respondents’ Answer, Dkt 19, filed Apr. 18, 2020

New York Law Journal, Brooklyn Federal Lockup Officials Describe ‘Shortage of Tests’ in Newly Filed Documents (Apr 15)

CNN, Exclusive: ‘I don’t think anybody was ready for this Covid,’ says head of federal prisons (Apr 10)

Northwest Arkansas Democrat-Gazette, Emails detail talks on illnesses at federal prison (Apr 15)

Mother Jones, Want to Know How Fast Coronavirus Can Spread in Prison? Look at Arkansas (Apr 15)

Santa Barbara Independent, Sisters Say Brother Sick with COVID-19 was Released from Lompoc Prison to Die (Apr 15)



INTERNAL MEMO TOUGHENS CARES ACT HOME CONFINEMENT STANDARDS

A recently-released prisoner complained to a TV station that FCI Butner was “slow-rolling” COVID-19 releases. A 76-year old federal prisoner told the Wall Street Journal that so far has been unable to convince officials to release him despite his age and history of respiratory problems. “It’s like pushing a wet noodle up the hill with your nose,” he said. An attorney representing the FCI Oakdale plaintiffs complained last Monday that only three prisoners have been given CARES Act releases. The Houston Chronicle said last Thursday that “as the coronavirus crisis raises concerns about mass infections at prisons and jails, few federal prisoners from southeast Texas have cleared the gauntlet for compassionate early release.”

The BOP, on the other hand, says it has already sent more than 1,119 to home confinement as of last Wednesday. Most recently, the entire population of FCI Otisville camp (111 inmates) was sent to quarantine in preparation for release to home confinement.

But last Wednesday, the BOP issued internal guidance that restricts those who can go to home confinement well beyond what Attorney General Barr directed. In an affidavit filed in WD Louisiana, an FCI Oakdale Associate Warden reported that “on April 15, 2020 we received a memorandum from BOP’s Correctional Programs Division, confirming the factors to be used when reviewing and referring inmates for home confinement... 1) Primary or prior offense is not violent; 2) Primary or prior offense is not a sex offense; 3) Primary or prior offense is not terrorism; 4) No detainer; 5) Mental Health Care Level is less than IV; 6) PATTERN... score is Minimum; 7) No Incident Reports in the past 12 months; 8) US Citizen; and 9) have a viable release plan.”

The BOP criteria are more restrictive than what Barr specified in his Mar 26 and Apr 3 memos. Barr made violence, sex or terrorism disqualifying only if it was the offense of conviction, the crime for which the inmate is now serving time. Plus, Barr did not outright disqualify for an incident report in the past year, or a PATTERN score above minimum. Rather, his memo merely said that such factors “would not [be] receiving priority treatment,” implying that they would be weighed against other factors.

The changes make home confinement for anyone other than a camper problematical. At FCI Elkton, only six inmates have been approved for home confinement, while 32 have been denied. At Oakdale, of 68 elderly inmates, 75% are ineligible. Only six of the remaining inmates have gone to home confinement.

WRAL-TV, Raleigh, NC, *Former inmate says Butner officials ‘slow-rolling’ prisoner releases during pandemic* (Apr 14)

WCTI-TV, New Bern, NC, *Ex-Trump lawyer Michael Cohen to serve out prison sentence at home* (Apr 17)

Houston Chronicle, *‘Crammed in’ and terminally ill: Prison officials drag their feet as vulnerable inmates seek release* (Apr 17)

Livas v Myers, Case No. 20cv422 (WDLA), Declaration of Juan Segovia, filed Apr 16, 2020, Dkt 14-1



FORMER JUDGES URGE 3RD CIRCUIT TO BACK OFF RAI A DECISION

Two weeks ago, the 3rd Circuit denied a compassionate release motion it clearly lacked the power to grant, but then went on to decide an issue that no one had raised, holding that the defendant had to exhaust remedies with the BOP first.

The defendant has petitioned for rehearing, and five former federal judges from 3rd Circuit courts have filed in support. In their brief, the judges argued that a court of appeals should not “issue a precedential opinion on a far-reaching and debatable issue of first impression, affecting numerous non-party

individuals in a wide range of circumstances – some of which are literally matters of life-or-death -that had not been addressed by the district court and was not briefed in the court of appeals by the parties.” They contend that the Raia panel “effectively decided a question that has divided courts across the country without acknowledging those authorities holding that the exhaustion requirement is subject to exceptions in the very circumstances presented here and without affording the parties the opportunity to argue why exhaustion should not be required under the FSA.”

They ask the Court to withdraw the exhaustion holding in the opinion, a holding already bedeviling compassionate relief filers across the country.

US v Raia, 3rd Cir Case No. 20-1033, Brief of Amici Curiae Former Members of the Judiciary in Support of... Rehearing (filed Apr 14, 2020)



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