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March 19, 2020

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

The Honorable Jeffrey A. Rosen
Deputy Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
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Mr. Michael Carvajal
Director
Federal Bureau of Prisons
320 First Street NW
Washington, DC 20534

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

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

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

¹ See U.S. Dep't of Justice Office of the Inspector General, *Review of the Federal Bureau of Prisons' Medical Staffing Challenges* (Mar. 2016), <https://oig.justice.gov/reports/2016/e1602.pdf> (finding that the BOP experienced chronic medical staff shortages and failed to take adequate measures to address them, leading to problems meeting the medical needs of prisoners, requiring the use of outside hospitals, and endangering the safety and security of institutions); U.S. Dep't of Justice Office of the Inspector General, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons* (Rev. Feb. 2016), <https://oig.justice.gov/reports/2015/e1505.pdf> (finding that BOP facilities and services, including medical services, were inadequate to meet the needs of an aging prison population leading to delays in medical treatment for prisoners with acute and chronic heart and neurological conditions, who wait an average of 114 days to see medical specialists.); David Patton, *Statement*

pretrial detention facilities are dramatically understaffed,² and populated by individuals who are older and medically compromised.³ Today, the Bureau of Prisons (BOP) confirmed that two staff members were presumed positive for COVID-19, marking the first possible cases in the federal prison system.⁴ They are surely not the last. As BOP has itself acknowledged, the risks of the rapid transmission of contagion in the tight quarters of prisons and jails present major challenges in keeping inmates and staff safe and healthy.⁵ This stark reality has been widely recognized.⁶

Lowering the population of prisons and jails is the simplest and most effective way to disrupt the transmission of COVID-19. Our clients and other incarcerated individuals—along with the correctional officers, attorneys, and contractors who spend their days moving between prisons and

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>.

² 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).

³ See U.S. Dep’t of Justice Office of the Inspector General, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons*, 1 (Rev. Feb. 2016) (From FY 2009 to FY 2013 “the number of inmates age 50 and older in BOP-managed institutions was the fastest growing segment of the BOP population, increasing by 25 percent.”); Erica Zunkel, *18 U.S.C. § 3553(a)’s Undervalued Sentencing Command: Providing a Federal Criminal Defendant with Rehabilitation, Training, and Treatment in “the Most Effective Manner,”* Notre Dame J. Int’l & Comp. L., Vol. 9: Issue 1, Article 5, at 57– 61 (2019) (detailing how, even before this crisis, the BOP’s overcrowding, staffing shortages, and treatment approach compromise its ability to provide adequate medical care to people in federal prisons, in particular those fifty and older).

⁴ 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/>.

⁵ See Fed. Bureau of Prisons, Program Statement 6190.04: Infectious Disease Management (2014).

⁶ See Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 *Clinical Infectious Diseases* 1047-155 (2007), <https://doi.org/10.1086/521910>; Gregg S. Gonsalves, et al., *Achieving A Fair And Effective COVID-19 Response: An Open Letter to Vice-President Mike Pence, and Other Federal, State, and Local Leaders from Public Health and Legal Experts in the United States* (March 2, 2020), <https://bit.ly/2W9V6oS> (open letter signed by 815 experts in public health, law, and human rights); see also, Danielle Ivory, *‘We Are Not a Hospital’: A Prison Braces for the Coronavirus*, N.Y. Times (Mar. 17, 2020), <https://www.nytimes.com/2020/03/17/us/coronavirus-prisons-jails.html>; Martin Kaste, *Prisons and Jails Worry About Becoming Coronavirus ‘Incubators’*, NPR (March 13, 2020), <https://www.npr.org/2020/03/13/815002735/prisons-and-jails-worry-about-becoming-coronavirus-incubators>; Keri Blakinger & Beth Schwarzapfel, *How Can Prisons Contain Coronavirus When Purell is a Contraband?*, ABA JOURNAL (March 13, 2020), <https://www.abajournal.com/news/article/when-purell-is-contraband-how-can-prisons-contain-coronavirus>; Jennifer Hansler & Kylie Atwood, *Pompeo Calls for Humanitarian Release of Wrongfully Detained Americans in Iran Amid Coronavirus Outbreak*, CNN (Mar. 10, 2020), <https://cnn.it/2W4OpV7>.

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

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

1. Direct all United States Attorneys' Offices to minimize arrests, decline to seek detention of individuals at their initial appearance in court and consent to the release of those already detained except in cases involving a specific and substantial risk that a person will cause bodily injury to or use violent force against the person of another; and
2. Direct BOP to utilize its existing authorities under the First Step Act and Second Chance Act to maximize the use of community corrections and compassionate release.

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

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

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

⁸ *See, e.g.*, Tim Prudente & Phillip Jackson, *Baltimore State's Attorney Mosby to Stop Prosecuting Drug Possession, Prostitution, and Other Crimes Amid Coronavirus*, Baltimore Sun (Mar. 18, 2020), <https://www.baltimoresun.com/coronavirus/bs-md-ci-cr-mosby-prisoner-release-20200318-u7kneeb6o5gqvnqmtpejftavia-story.html> (Baltimore State's Attorney ordered staff to “dismiss pending criminal charges against anyone arrested for possessing drugs including heroin, attempted distribution of any drug, prostitution, trespassing, minor traffic offenses, open container and urinating in public”); Erica Orden, *Brooklyn Will Stop Prosecuting “Low-Level Offenses that Don't Jeopardize Public Safety,”* CNN (Mar. 17, 2020), https://www.cnn.com/world/live-news/coronavirus-outbreak-03-17-20-intl-hnk/h_0254c4f54c1c52e79ce419e22ca35e6b (Brooklyn DA will stop prosecuting low-level offenses and is also asking public defenders to inform office of vulnerable clients detained pretrial whom the DA “should consider releasing during this crisis”); Max Marin & Rya Briggs, *Philly Police to Halt Narcotic Arrests, Other Charges During COVID Outbreak*, WHYY.org (Mar. 17, 2020), <https://whyy.org/articles/philly-police-to-halt-narcotics-arrests-other-charges-during-covid-outbreak/> (Philadelphia Police Commissioner instructed department to delay arrests for low-level criminal offenses, including all narcotics activity); Darwin BondGraham, *San Francisco Officials Push to Reduce Jail Population to Prevent Coronavirus Outbreak*, The Appeal (Mar. 11, 2020), <https://theappeal.org/coronavirus-san-francisco-reduce-jail-population/> (District Attorney “directed prosecutors not to oppose motions to release pretrial detainees facing misdemeanor charges or drug-related felony charges if the person is deemed to pose no threat to public safety. [He] also directed his staff to ‘strongly consider’ credit for time served in plea deals so that more people can be released”); *see also* Julia Marsh & Ben Feuerherd, *NYC to Begin Releasing Inmates Amid Coronavirus Outbreak*, N.Y. Post (Mar. 18, 2020), <https://nypost.com/2020/03/18/nyc-to-begin-releasing-inmates-amid-coronavirus-outbreak/>

Enforcement (ICE) have taken initial—but insufficient—steps in the same direction.⁹ DOJ should immediately expand their efforts more broadly.

These changes will neither jeopardize public safety nor increase failure to appear rates; data proves that higher federal release rates do not lead to more crime or flight.¹⁰ Even before this crisis, the Chair of the House Judiciary Committee lamented that federal “release rates have steeply declined” since the passage of the Bail Reform Act, and said, “surely community safety does not justify this trend.”¹¹

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

1. Decline or suspend prosecutions, except in cases involving a specific and substantial risk that a person will cause bodily injury to or use violent force against the person of another.
2. Seek arrest warrants only in cases involving a specific and substantial risk that a person will cause bodily injury to or use violent force against the person of another, and recall outstanding warrants in cases that do not involve such a risk;

(“Mayor Bill de Blasio plans to release ‘vulnerable’ inmates from city jails to prevent the spread of the coronavirus pandemic into local lockups”).

⁹ See Maria Sacchetti & Arelis Hernandez, *ICE to Stop Most Immigration Enforcement Inside U.S., Will Focus on Criminals During Coronavirus Outbreak*, Wash. Post (Mar. 18, 2020), https://www.washingtonpost.com/national/ice-halting-most-immigration-enforcement/2020/03/18/d0516228-696c-11ea-abef-020f086a3fab_story.html.

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

Table H-15.
U.S. District Courts ---- Pretrial Services Violations Summary Report
For the 12-Month Period Ending September 30, 2019

Circuit and District	Total Cases Open	Cases In Release Status	Pct.	Cases with Violations	Pct.	Rearrest Violations			FTA Violations	Technical Violations	Reports to Court
						Felony	Misde-meanor	Other			
TOTAL	193,632	53,476	27.6	8,761	16.4	406	505	65	618	8,086	13,544

These numbers hold steady for the federal districts with the highest release rates in the country. In 2019, the six districts with the highest release rates (average 69.08%) had an average failure to appear rate of 0.42% and an average re-arrest rate of 0.91%. See AO Table H-15; Table H-14A, https://www.uscourts.gov/sites/default/files/data_tables/jb_h14a_0930.2019.pdf.

¹¹ *The Administration of Bail by State and Federal Courts: A Call for Reform: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 115th Cong. 50:55 (2019), <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2256>.

3. Decline to seek detention of individuals at their initial appearance in court and consent to the release of those already detained absent cases involving a specific and substantial risk that a person will cause bodily injury to or use violent force against the person of another. Failure to adopt this policy would run afoul of the Constitution; pretrial detention under these circumstances is not purely “regulatory in nature,” but rather “constitute[s] punishment before trial in violation of the Due Process Clause.”¹²

B. BOP Should Immediately Accelerate And Expand Inmates’ Transfer To Community Corrections.

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

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

BOP has directed staff to comply with this directive.¹⁵

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

¹² *United States v. Salerno*, 481 U.S. 739, 748 (1987).

¹³ See, e.g., U.S. Dep’t of Justice Office of the Inspector General, *Audit of the Federal Bureau of Prisons’ Management of Inmate Placements in Residential Reentry Centers and Home Confinement* 22 (Nov. 2016).

¹⁴ The First Step Act of 2018, § 602, Pub. L. No. 115-391, 132 Stat. 5194, 5238 (2018) (amending 18 U.S.C. § 2624(c)(2)) (emphasis added).

¹⁵ See Fed. Bureau of Prisons, Operations Memorandum: 001-2019 at 2, *Home Confinement under the First Step Act*, (Apr. 4, 2019) (providing that “staff should refer eligible inmates for the maximum amount of time permitted under the statutory requirements”).

¹⁶ See 18 U.S.C. § 3621(b)(3) (requiring consideration of designation decision include the “characteristics of the prisoner”); 18 U.S.C. § 3624(c)(6)(B) (requiring regulation that includes placement in community

considered in making these individualized assessments. BOP currently has the authority to immediately and significantly expand its use of community-based correctional facilities. Congress recognized the value of providing community-based reentry by both doubling the time of community corrections in the Second Chance Act and by expanding potential community corrections beyond one year for certain prisoners eligible for earned time credits in the First Step Act. Full utilization of community corrections to reduce BOP's population is consistent with Congress's purpose in enacting those laws.

BOP can exercise its designation authority to address COVID-19 by directing staff to reassess, pursuant to 18 U.S.C. § 3621(b), whether individuals can be immediately transferred to community corrections for the maximum available time or otherwise accelerate transfer to community corrections. BOP should also increase use of the elderly offender pilot program for home confinement, as modified by § 603 of the First Step Act.¹⁷ The First Step Act's expansion of this program reflects the lower recidivism rate for elderly offenders and allows BOP to place vulnerable offenders over 60 years old in home confinement for a larger portion of their sentence. *See* 18 U.S.C. § 3621(c)(1); 34 U.S.C. § 60541(g)(1)(C).

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

The First Step Act expanded sentencing court's discretion to reduce sentences based on “extraordinary and compelling reasons” under 18 U.S.C. § 3582(c)(1)(A)(i). The COVID-19 pandemic unquestionably constitutes “extraordinary and compelling reasons.” Centers for Disease Control and Prevention has identified persons over the age of 60, as well as persons with diabetes, respiratory problems, and compromised immune systems as facing special danger from COVID-19.¹⁸

BOP should respond to this national emergency by amending its policy statement on compassionate release to specifically include consideration of those individuals in prison whose health is most at

corrections “determined on an individual basis”); 28 C.F.R. § 524.11(b) (providing for program reviews with prisoner participation). In addition, BOP would be meeting the statutory directives calling for maximum time in community corrections for certain categories of prisoners. *See* 18 U.S.C. § 3624(c)(2) (“The Bureau of Prisons shall, to the extent practicable, place prisoners with lower risk levels and lower needs on home confinement for the maximum amount of time permitted under this paragraph.”); 34 U.S.C. § 60541 (a)(2)(A) (“Incentives for a prisoner who participates in reentry and skill development programs which may, at the discretion of the Director, include [] the maximum period in a community confinement facility”); Fed. Bureau of Prisons, Program Statement 5330.11: Psychology Treatment Programs, § 2.5.15(a)(1)(ii) (incentives for RDAP participation), 19 (2009) (RDAP participants should receive “[c]onsideration for the maximum period of time in a community-based treatment program[.]”).

¹⁷ *See* First Step Act of 2018, § 603, Pub. L. No. 115-391, 132 Stat. 5194, 5238 (2018); *see also* Fed. Bureau of Prisons, Operations Memorandum: 001-2019, *Home Confinement under the First Step Act* (Apr. 4, 2019).

¹⁸ *See* Centers of Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19) Are You at High Risk for Severe Illness?* (March 12, 2020), <https://bit.ly/2vgUt1P>.

risk with this pandemic. The United States Sentencing Commission's examples of extraordinary and compelling reasons in the commentary to the compassionate release guideline recognize BOP's continued authority to recommend a reduction in sentence based on factors other than those already identified. U.S.S.G. § 1B1.13, comment n.1(D). By informally amending its compassionate release program statement on an emergency basis,¹⁹ BOP could directly address the need for judicial consideration of reduced sentences for those who are particularly susceptible to COVID-19, with the sentencing judge making the ultimate decision on whether to grant a reduction.

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

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

Sincerely,

s/

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Co-Chair, Federal Defender Legislative Committee

s/

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¹⁹ See Fed. Bureau of Prisons, *Program Statement 5050.50: Compassionate Release/Reduction in Sentence Procedures for Implementation of 18 U.S.C. §§ 3583 and 4205(g)* (2019).

²⁰ See Federal Bureau of Prisons, *Compassionate Release Program - First Step Act of 2018, Report to Congress* 4 (Feb. 13, 2020).

²¹ See *id.* at 4-5.

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