

May 18, 2020

Executive Office of the Mayor
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

The Council of the District of Columbia
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Dear Mayor Muriel Bowser
Chairman Phil Mendelson,
Councilmember Charles Allen,
Councilmember Anita Bonds,
Councilmember Mary Cheh,
Councilmember Vincent C. Gray,
Councilmember David Grosso,
Councilmember Kenyan McDuffie,
Councilmember Brianne K. Nadeau,
Councilmember Elissa Silverman,
Councilmember Brandon T. Todd,
Councilmember Robert White, Jr.,
and Councilmember Trayon White, Sr.,

In our [letter](#) of March 26, 2020, we proposed action that could be taken by a variety of leaders to reduce the number of individuals in the custody of the Department of Corrections (DOC) in order to reduce the risk of individuals in custody contracting COVID-19 and reduce the risk to DOC staff and the community. Since that time, both the Mayor's office and the Council have taken some significant steps to decrease the number of people incarcerated at the D.C. Jail who had been serving sentences for misdemeanor offenses. The Council also passed compassionate release legislation and legislation that increased the good time credit provided to individuals serving indeterminate sentences, thereby correcting a long-standing inequity between determinate and indeterminate sentencing.

We now write directly to your offices in recognition of those efforts, and with follow-up requests about additional measures that the Mayor and Council should take to protect the health and rights of those impacted by our criminal legal system.

As of today, 1,350 people remain incarcerated in the custody of the Department of Corrections (DOC). Another 2,871 individuals are in the custody of the Bureau of Prisons (BOP). As you know, a federal judge recently held that plaintiffs who are incarcerated in DOC custody produced sufficient evidence that DOC's inadequate precautionary measures increased their risk of contracting COVID-19 and facing serious health consequences, including death while in

custody. The federal court has ordered that immediate action be taken by the Department of Corrections to address some of these harms.¹ Nonetheless, a serious risk of transmission continues to exist for those incarcerated in DOC facilities. This is evident in the increasing number of people who have tested positive for COVID-19 as each day passes. Even without universal testing of all DOC residents, as of May 11, 2020, the rate of COVID-19 in the DOC was 14 times higher than the rate in the District.²

Our specific recommendations are attached and they include:

- 1) Mandating and implementing universal testing of all individuals in custody and DOC staff
- 2) Releasing individuals nearing the end of their sentences
- 3) Prioritizing release to home confinement of individuals serving Bureau of Prison sentences in DOC custody
- 4) Modifying discovery practices to allow individuals a fair opportunity to defend their cases
- 5) Suspending mandatory minimum sentences and giving judges discretion to delay sentencing
- 6) Providing critical funding for community-based reentry service providers and for housing for returning citizens.
- 7) Amending the District's criminal record and sealing laws to provide greater opportunities for returning citizens to access job and housing resources
- 8) Amending DC's compassionate release statute to place vulnerability to COVID-19 as a separate standalone basis for compassionate release.

In addition to the attached requests, we recommend that you appoint a population reduction expert to work with the Council, the Mayor, and stakeholders to safely further reduce the incarcerated population. Despite the earlier efforts of the Mayor and the Council, the population in DOC custody has begun to increase. Further, the population of individuals convicted of D.C. Code offenses in BOP custody has not meaningfully decreased. At the same time, conditions in BOP and DOC continue to pose a serious risk to the health of incarcerated individuals, with continuing infections and death.

Thank you for your consideration, and we look forward to discussing these recommendations with you at your earliest convenience.

The Thrive Under 25 Coalition

Reentry Action Network

¹ *Banks v. Booth*, No. 20-cv-849 (CKK) (D.D.C. 2020).

² See Justice Policy Institute: <http://www.justicepolicy.org/index.html>.

Justice Policy Institute
ACLU of the District of Columbia
Washington Lawyers' Committee
Campaign for the Fair Sentencing of Youth
Public Defender Service for the District of Columbia
Defender Impact Initiative
DC Jail and Prison Advocacy Project
Free Minds Book Club & Writing Workshop
Council for Court Excellence **
(Council for Court Excellence was not a signatory to the letter of March 26, 2020)

Disability Rights DC
Campaign for Youth Justice
Georgetown Pivot Program
Georgetown Prisons and Justice Initiative
Second Look Project

Superior Court Trial Lawyers Association

Amazing Gospel Souls

National Reentry Network for Returning Citizens

Community Family Life Services

Jubilee Housing

DC Project Connect

Open City Advocates

School Justice Project

The Sentencing Project

Project New Opportunity

The Washington Legal Clinic for the Homeless

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*Titles for identification purposes only.

The following list of comprehensive recommendations should be enacted immediately to protect the lives and health of D.C. residents impacted by the criminal legal system during the Covid-19 pandemic:

1) Mandate Universal Testing of Individuals in Custody and DOC Facilities-Based Staff

In light of the high incidence of COVID-19 in DOC facilities, we recommend that the Department of Corrections test all individuals in custody and all DOC facilities-based staff. The District has spare testing capacity and many deaths from COVID-19 have gone undetected. Testing all individuals in DOC custody allows for the identification of symptomatic people who have not presented themselves to DOC staff or Unity Health Care for evaluation and treatment. It also allows for the identification of asymptomatic people who may spread COVID-19 to others. Residents and facilities-based staff should be tested immediately and at least every two weeks since employees may be exposed to COVID-19 in the community or in the facilities and residents may be exposed from individuals entering the jail and DOC staff.

2) Release Individuals with 12 Months or Less Left to Serve

One way that states have protected incarcerated people from the spread of COVID-19 is by releasing individuals from prison when they are close to their release dates. For example, Washington released nearly a thousand individuals who were nearing the end of their sentences.³ In Maryland, Governor Hogan signed an executive order authorizing the release of many individuals with four months left to serve on their sentences.⁴ Similarly in Virginia, Governor Northam, with the approval of the legislature, granted the Department of Corrections the authority to release individuals who are within one year of completing their sentence.⁵ The Heroes Act, which was introduced in the House of Representatives on May 12, 2020, would mandate community supervision for people over 50, those with certain medical conditions, and

³ Ashley Hiruko, “Nearly 1,000 Inmates To Be Released In Washington State. Not Enough For Social Distancing, Advocates Say,” Oregon Public Broadcasting, April 13, 2020. Available at: <https://www.opb.org/news/article/washington-inmates-release-social-distancing-coronavirus/>

⁴ Ovetta Wiggins and Erin Cox, “Hogan signs order to release hundreds of inmates to reduce spread of coronavirus,” Washington Post, April 19, 2020. Available at: https://www.washingtonpost.com/local/md-politics/hogan-signs-order-to-release-hundreds-of-inmates-to-reduce-spread-of-coronavirus/2020/04/19/5ac6c17c-8264-11ea-ae26-989cfee1c7c7_story.html

⁵ Frank Green, Virginia Department of Corrections determining early release eligibility for inmates, Richmond Times-Dispatch, April 24, 2020. Available at: https://www.dailyprogress.com/news/state/virginia-department-of-corrections-determining-early-release-eligibility-for-inmates/article_74af2097-516e-5e53-846e-b1e380535074.html

individuals that are within 12 months of release, unless BOP finds by clear and convincing evidence that the person poses a “specific and substantial” risk of violence.⁶

While the District released most individuals serving misdemeanor sentences, many individuals remain incarcerated with short periods remaining on felony sentences. While some individuals may qualify for compassionate release, that process requires filing a motion, a response from the government, and judicial review – all which can take a considerable amount of time.

As a result of the complexities of the District’s criminal system landscape, the District cannot order the Bureau of Prisons to undertake a review of individuals incarcerated on D.C. Code felonies or to engage in release planning for incarcerated District residents. However, the Mayor and the Council can pass legislation that would shorten all sentences that are within one year of completion. This action would immediately begin to reduce the population of District residents who are incarcerated in settings that leave them extremely vulnerable to the contraction of COVID-19. This legislation would also allow some individuals who are in the legal custody of the Bureau of Prisons, but the physical custody of the Department of Corrections to be released. Releasing some residents from DOC custody increases the safety of the remaining residents and staff by allowing for more social distancing, and a lower staff to resident ratio.

Since the District cannot order the BOP to engage in release planning, the District can begin reaching this population through the Corrections Information Council and the Mayor’s Office on Returning Citizen Affairs and make connections to reentry services where necessary.

We also recognize and appreciate the importance of victims’ rights and of providing notice of release to victims. The District should address the concerns of victim’s rights organizations and those of individuals about receiving notice of modified release dates. Pursuant to D.C. Code, § 23-1901, victims of crime are entitled to notice of release dates. Under BOP Program Statement 1490.06, “Telephonic contact must be made [with the victim] when the inmate’s release is unexpected and/or immediate (i.e., court-ordered release, etc.).”⁷ By working closely with the Bureau of Prisons, the District can ensure that victims in the District receive appropriate notification of release as provided for in BOP policy. We appreciate the concerns raised by the Network for Victim Recovery of DC and the DC Coalition Against Domestic Violence, in particular, and we are eager to work with them to discuss these issues further in an effort to address victims’ concerns while also meeting the urgency of releasing individuals to safety during this crisis.

The following language is proposed:

Notwithstanding any other provision of law, an individual with 12 months or less remaining to serve on any one or more sentences imposed shall be released from custody; any period of community supervision that was previously imposed as part of the original sentence shall commence upon release.

⁶ <https://docs.house.gov/billsthisweek/20200511/BILLS-116hr6800ih.pdf>

⁷ https://www.bop.gov/policy/progstat/1490_006_CN-1.pdf

3) Prioritize Release to Home Confinement for Individuals Serving BOP Sentences in DOC Custody

Individuals who are sentenced to incarceration on felony offenses are committed to the legal custody of the Bureau of Prisons. At times, individuals committed to the BOP remain in the physical custody of the Department of Corrections to serve their sentence in a DOC facility. This generally occurs when an individual receives a relatively short prison sentence, but may now also be the case because the transfer of sentenced individuals from a DOC facility to BOP facilities has slowed in the wake of COVID-19.

18 USC 3624(c)(2), which applies to individuals sentenced on D.C. Code offenses as well as federal offenses, provides that people serving felony sentences can spend the last 6 months or 10 percent of their sentence, whichever is shorter, on home confinement. Through the CARES Act,⁸ Congress granted the Attorney General the authority to expand home confinement. The latest policy guidance by the BOP prioritizes individuals for release if they have committed non-violent offenses and if they have served 50 percent or more of their sentence or if they have served 25 percent or more of their sentence and have 18 months or less remaining to serve.⁹

Transitioning individuals from incarceration to home confinement, consistent with the CARES Act, requires case management services and reentry planning. The Department of Corrections, in its capacity as a contractor of the Bureau of Prisons should be engaging in that planning for the individuals who are serving felony sentences in its custody. However, to date, it is not clear whether the Department of Corrections is in fact taking steps to ask BOP to release individuals to home confinement. We urge the Council and the Mayor to direct the DOC to engage in the evaluations and reentry planning necessary to transfer individuals to home confinement. If DOC lacks the case management resources to engage in the required planning, we urge the Mayor to detail individuals from other agencies to perform these vital services in conjunction with Reentry Action Network (RAN) member agencies. Prior to COVID-19 restrictions, a significant number of RAN members conducted services and programs for residents in the DOC facilities, as such they already have established relationships with the DOC and with this access and expertise would lend for effective reentry planning PRIOR to release.

4) Modify Discovery Practices

During the public health emergency, some defendants are afforded minimal discovery related to the alleged offenses for which they are incarcerated or subject to pretrial supervision. At this time, defendants who are presented shortly after their arrest for a detention determination receive

⁸ CARES Act, home confinement authority section, available at: https://www.fd.org/sites/default/files/covid19/caresact_home_confinement.pdf

⁹ Department of Justice Memorandum, April 22, 2020, available at: https://www.fd.org/sites/default/files/covid19/bop_jail_policies_and_information/4.22_memo_0.pdf

a single document that describes the allegations against them. The document typically provides unattributed statements about the defendant's alleged actions. Even when the defendant is detained on the alleged offense, he or she is not necessarily entitled to video recordings, photographs, or police documents that are directly relevant to the case and that might, with defense investigation, show the defendant's innocence. During the public health emergency, some defendants have received some discovery, while others have received none. Under normal circumstances, defendants have an evidentiary hearing within at most 14 days of their detention and are entitled to cross-examine a government witness about the circumstances of the case and receive documents created by the witness and those that contain the witness's statements. That witness is always someone in law enforcement. Which means the materials defendants used to receive within two weeks of their detention would include additional police reports, notes, surveillance footage, and body-worn camera footage. Further, it is more critical now than before for defendants to receive as much discovery as possible because the public health emergency has all but foreclosed a defendant's ability to independently have their case investigated.

A lack of discovery for some defendants and the particular need for all defendants to receive more expansive discovery at this time warrant legislation to make sure that all defendants receive complete discovery as soon as possible. During the public health emergency, since evidentiary hearings have been significantly delayed and because communication between the client and the lawyer is limited at best, defense counsel should receive open file discovery from prosecutors.

The following language is proposed:

During the public health emergency declared as a result of the COVID-19 pandemic or until the Court resumes preliminary hearings pursuant to the timelines outlined in D.C. Code § 23-1322 and D.C. Superior Court Rule of Criminal Procedure 5.1, whichever occurs later, the defendant shall be entitled to open file discovery including access to all reports, photographs, documents, video and audio recordings, statements, and forensic and/or scientific evidence, within five days of presentment in D.C. Superior Court or as soon as the prosecution comes into possession of the above-referenced materials, except that prosecutors may seek a ruling from the trial court in appropriate cases that redaction of witness names or contact information is necessary based upon a particularized showing of serious safety concerns. This discovery obligation does not supplant the prosecution's obligations pursuant to *Brady v. Maryland*.

5) Suspend Mandatory Minimum Sentences While COVID-19 Is a Threat to the Health and Safety of Incarcerated Individuals

Numerous D.C. Code offenses require judges to sentence individuals to mandatory minimum sentences of incarceration. These mandatory minimum sentences do not take into account the personal health circumstances of the individual even when the imposition of a custodial sentence carries the grave danger of death from COVID-19. For example, an individual with a prior felony conviction, even if that conviction is decades old, must be sentenced to a mandatory term of incarceration of one year for the non-violent possession of a firearm. Rather than mandating a minimum sentence for all individuals, judges should be given maximum flexibility during the public health crisis caused by COVID-19 to suspend mandatory minimum sentences, delay sentences, and to hold sentences in abeyance.

The following language is proposed:

Notwithstanding any other provision of the law, a judge may impose a sentence that is less than the mandatory minimum term of incarceration or hold a sentence in abeyance until such time that there is not a grave risk of contracting COVID-19 in the custody of the Department of Corrections or the Bureau of Prisons.

6) Provide Funding for Community-Based Reentry Service Providers and for Housing for Returning Citizens

Prior to this public health emergency, up to 2,000 District residents were released from BOP custody each year and another 12,000 people were released from the custody of the Department of Corrections. These numbers will likely be higher this year. As District residents return home from incarceration they will need the support and mentoring of community-based reentry service providers. In order to provide essential services and support to returning citizens during this period of widespread unemployment and uncertainty, community-based reentry service organizations need District funding.

While some returning citizens will return to live with their family members, others will need short-term housing. In addition to the short term-housing necessary for people transferring to home confinement or released during the pandemic, the District needs more transitional reentry beds for all people released from prison and jail. Fifty percent of the Office of Victim Services and Justice Grants (OVSJG) reentry grantee clients are without safe, stable housing when they enter jail and prison. Grantees that serve especially vulnerable populations, such as returning citizens with serious mental illness, report homelessness report rates as high as 95 percent. There is an urgent need to fund transitional housing for some of the District's most vulnerable residents who are coming home from incarceration.

We urge the District to provide \$400,000 in funding for community-based reentry services providers and 1.8 million to OVSJG in FY21 to fund the first year of a three-year, 50-bed reentry housing pilot for men.¹⁰

7) Amend the District's Criminal Record Sealing and Expungement Laws

More than 80,000 unemployment compensation claims have been filed in the District since mid-March. Many returning citizens have lost their jobs and others, more recently released, never even had the chance to interview before the stay-at-home orders went into effect. When

¹⁰ We estimate the housing pilot project would cost approximately \$1.8 million dollars annually to operate. The total cost for a three year pilot would be about \$5.5 million dollars. The pilot project would allow 50 men who have recently returned from incarceration or are preparing for release to access rent subsidies, security deposits, furniture and other essentials for 12 months each. In addition, it would provide recovery-oriented case management services to ensure these individuals have the support required to manage their apartments, fulfill their obligations and live their fullest lives.

businesses finally begin to rehire, we know that people with criminal records in D.C., 80 percent of whom are Black¹¹, will be at the back of the line for consideration for employment. In one nationwide survey, 73 percent of employers responded that even a nonviolent misdemeanor conviction would be “somewhat” or “very influential” in their decision not to extend a job offer.¹²

Despite our Ban the Box law, many returning citizens still struggle to find employment because their criminal history is readily publicly available. The only way to change this is to reform D.C.’s criminal record sealing and expungement law. The one in seven adult residents who have a criminal record should not be subject to even greater economic injury because of the public health emergency.

We ask that the Council mark-up the pending criminal record sealing and expungement bills by July 15 and pass legislation by September 15, and that Mayor Bowser sign the resulting act into law.

8) Amend the Recently Passed Compassionate Release Statute to Clarify that Vulnerability to COVID-19 is an Independent Extraordinary Reason for Relief

On April 10, 2020, the COVID-19 Response Supplemental Emergency Act of 2020, A23-0286, became law. Section 305 allows a judge to grant compassionate release and thereby modify a term of incarceration when the defendant is not a danger to the safety of any person or the community and meets the statutory criteria or presents other extraordinary circumstances that warrant a sentence modification.

While the language of the statute is broad and uses the term “including” to describe possible situations that would warrant a sentence reduction through the grant of compassionate release, it is important to amend the statute to place vulnerability to COVID-19 as a separate standalone basis for compassionate release. Without an amendment, courts may hold that an individual’s acute vulnerability to death or serious complications from COVID-19 may only be a basis for relief when the individual is age 60 or older and has completed a large percentage of his or her sentence. This interpretation would be at great cost to life since over 53% of the 49 people that have died in the BOP to date were under 60.¹³

¹¹ Urban Institute, *Criminal Background Checks and Access to Jobs A Case Study of Washington, DC*, 2017. Retrieved from https://www.urban.org/research/publication/criminal-background-checks-and-access-jobs/view/full_report.

¹² <https://www.irc.wisc.edu/publications/focus/pdfs/foc232h.pdf>

¹³ See BOP press releases at: https://www.bop.gov/resources/press_releases.jsp

It appears that it was the Council’s intent to include COVID-19 as an independent basis for relief. The District’s compassionate release bill was modeled on the federal compassionate release that was included as part of the First Step Act. Although the First Step Act is silent on COVID-19, judges have granted compassionate release by citing vulnerability to COVID-19 as a primary basis for relief for individuals under age 60.¹⁴ The decision to include COVID-19 as an independent basis for relief that is not tied to age or percentage of sentence served, should also follow from the danger of death and severe complications from COVID-19 in relatively young individuals and the District’s experience with the disease. For instance, on April 13, 2020, a 59 year old man in pretrial detention in Department of Correction custody died of COVID-19.¹⁵ The first individual to die of COVID-19 in the Bureau of Prisons was 49 years old.¹⁶ The first BOP staff member to die of COVID-19 was 39 years old.¹⁷ The District tragically lost Kenneth Moore, a 52 year old youth development representative for the Department of Youth Rehabilitation Services.¹⁸ The national experience with COVID-19 counsels against any age restriction on compassionate release and for the use of judicial discretion to reduce sentences when individuals can be safely released to the community.

To clarify the legislation, we recommend the following modification:

(a) Notwithstanding any other provision of law, the court may modify a term of imprisonment imposed upon a defendant if it determines the defendant is not a danger to the safety of any other person or the community, pursuant to the factors to be considered in 18 U.S.C. §§ 3142(g) and 3553(a) and evidence of the defendant's rehabilitation while incarcerated, and:

(1) The defendant has a terminal illness, which means a disease or condition with an end-of-life trajectory;

¹⁴ Federal decisions granting compassionate release based on heightened vulnerability to COVID-19, even when prisoner’s age does not meet criteria specified in federal guidelines: *see, e.g., United States v. Scparta*, No. 18-cd-578 (AJN), 2020 WL 1910481, at *9 (S.D.N.Y. Apr. 20, 2020) (finding “extraordinary and compelling reasons” for compassionate release of 55-year-old defendant suffering from “multiple medical issues that make him especially vulnerable to complications from COVID-19,” including hypertension and high cholesterol); *United States v. Lacy*, No. 15-cr-30038, 2020 WL 2093363, at *6 (C.D. Ill. May 1, 2020) (same for 31-year-old with hypertension and diabetes); *United States v. Park*, No. 16-cr-473 (RA), 2020 WL 1970603, at *3-4 (S.D.N.Y. Apr. 24, 2020) (same for 31-year-old with asthma and compromised immunity); *United States v. Wen*, No. 6:17-CR-06173 EAW, 2020 WL 1845104, at *7 (same for 48-year-old with asthma); *United States v. Perdigao*, No. CR 07-103, 2020 WL 1672322, at *3 (E.D. La. Apr. 2, 2020) (same for 58-year-old with heart disease and hypertension).

¹⁵ Keith L. Alexander, “Man charged in fatal stabbing is D.C. jail’s first inmate to die of covid-19,” *Washington Post*, April 14, 2020.

¹⁶ See press release of U.S. Department of Justice, describing that Patrick Jones, age 49, was the first individual to die in Bureau of Prisons custody. Available at: https://www.bop.gov/resources/news/pdfs/20200328_press_release_oak_death.pdf

¹⁷ Cassidy McDonald, “Federal prisons confirm first staff death linked to coronavirus,” *CBS News*, April 18, 2020. Available at: <https://www.cbsnews.com/news/coronavirus-federal-prisons-confirm-first-staff-death-linked-to-covid-19-robin-grubbs-usp-atlanta/>

¹⁸ Tom Jackman, “D.C. juvenile corrections officer who died of covid-19 was committed to youth at home and at work, family and colleagues say,” *Washington Post*, April 2, 2020.

- (2) The defendant is 60 years of age or older and has served at least 25 years in prison; or
- (3) Other extraordinary and compelling reasons warrant such a modification, including:
- (A) A debilitating medical condition involving an incurable, progressive illness, or a debilitating injury from which the defendant will not recover;
 - (B) Elderly age, defined as a defendant who is:
 - (i) 60 years of age or older;
 - (ii) Has served at least 20 years in prison or has served the greater of 10 years or 75% of their sentence; and
 - (iii) Suffers from a chronic or serious medical condition related to the aging process ~~or that causes an acute vulnerability to severe medical complications or death as a result of COVID-19;~~
 - (C) Death or incapacitation of the family member caregiver of the defendant's children; or
 - (D) Incapacitation of a spouse or a domestic partner when the defendant would be the only available caregiver for the spouse or domestic partner; or
 - (E) Acute vulnerability to severe medical complications or death as a result of COVID-19.