



COMMONWEALTH OF KENTUCKY

DEPARTMENT OF PUBLIC ADVOCACY

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March 26, 2020

Hon. Mary Noble
Secretary, Justice & Public Safety Cabinet
125 Holmes St.
Frankfort, KY 40601-2108
(sent via emailed PDF)

Ms. Leila A. VanHoose
Chair, Kentucky Parole Board
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(sent via emailed PDF)

Dear Secretary Noble and Chair VanHoose:

We write regarding the anticipated spread of Coronavirus Disease 2019 (COVID-19) to people incarcerated in Kentucky prisons. As Kentucky's Public Advocate and Post Trial Division Director, we are concerned about the well-being of our agency's clients and all other incarcerated people. We appreciate that all of you are doing your best to maintain the health of incarcerated people in Kentucky. On March 11, 2020, the World Health Organization designated COVID-19 a global pandemic.¹ While there are no known cases of COVID-19 within DOC facilities to date, that will almost certainly change. Given the mortality rate associated with the virus, we are concerned about the virus's spread to at-risk people, particularly the elderly, within the closed confines of a prison setting. We are requesting that DOC and the Kentucky Parole Board implement the following measures to reduce virus transmission and potential loss of life. These requests are consistent with the Center for Disease Control and Prevention's *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, issued just this week, on March 23, 2020.²

¹ World Health Organization, *Rolling updates on coronavirus disease (COVID-19)* (March 11, 2020), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen>.

² Centers for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (March 23, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#Lim_Onsite.

Kentucky's prisons house large numbers of elderly people and people with complex medical conditions. If infected with COVID-19, these individuals are more vulnerable to becoming seriously ill and requiring intensive medical care.³ If COVID-19 gains a foothold in Kentucky's prisons, there is a risk of widespread infection and death, particularly for elderly persons.⁴ Prisons are not medical care facilities, and do not have on hand the medications and medical equipment necessary to care for those under the care of the facility. Prisons also lack adequate medical staff to meet the needs of a COVID-19 outbreak. In the event of widespread infection, there is further risk of DOC staffing shortages, scarce medical resources, and institutional disturbances, which will pose an additional health and safety concern for incarcerated people, staff, and the public at large.

We are writing to you today to request that you use your influential positions to take bold action to mitigate potential harm before it is too late. Below are specific recommendations for steps authorized under current law that could be done very quickly and significantly reduce risk.

Requests and Recommendations to Kentucky Parole Board: Targeted Population Reduction

Given the serious risks posed by COVID-19, we ask the Parole Board to take immediate steps to plan for ways to reduce the prison population by some significant percentage – e.g. by 5% or 10% – if required by the circumstances of the pandemic. These measures are also supported by the public, with strong, cross-ideological support for dramatically reducing jail and prison populations to slow the spread of the coronavirus. Sixty-six percent of likely voters believe elected officials should be considering measures to reduce overcrowding in prisons and jails as a response to coronavirus.⁵ This can be accomplished in the following ways.

1. **Release of Medically At-Risk Individuals.** This Board has authority to release those who qualify for medical parole due to a terminal illness under KRS 439.3405, or who qualify for medical parole due to significant medical impairment under the 2018 Budget Bill (2018 HB 200, Section H.5.c.(3)). The Board should expedite this process by automatically paroling anybody who the Department of Corrections certifies meets the criterion for release under either provision. These inmates are consuming a disproportionate amount of DOC's medical resources, which are likely to be needed elsewhere before the end of this crisis to ensure that an automated or largely automated release process will not create a risk to public safety.
2. **Targeted Population Reduction.** For most non-violent offenders, the minimum parole eligibility and qualifications for release are set by the Board through its regulations. See KRS 439.340(3)(b). We respectfully suggest that the Board can reduce the prison population today under existing law by amending its eligibility policy on an emergency basis to allow for immediate parole consideration for the following groups:

³ Centers for Disease Control and Prevention, *Coronavirus Disease 19 (COVID-19): People at Higher Risk* (March 10, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html>.

⁴ Jack Healy, Matt Richtel, Mike Baker, *Nursing Homes Becoming Islands of Isolation Amid 'Shocking' Mortality Rate* (March 10, 2020) (noting high death rates in environments with large groups of elderly people), <https://www.nytimes.com/2020/03/10/us/coronavirus-nursing-homes-washington-seattle.html>.

⁵ *Fighting the Coronavirus with Decarceration: Policies & Polling*, Data for Progress (March 2020), <http://filesforprogress.org/memos/fighting-coronavirus-with-decarceration.pdf>.

- a. Those inmates certified by Corrections to be at **high-risk of significant complications** upon COVID-19 infection under CDC guidelines.
 - b. All **non-violent Class D and Class C offenders** who are housed in county jails. The risk of spreading infection in jails is especially severe in light of the chronic overcrowding in Kentucky jails. Jails will not have the capacity to contain the spread of infection and jails are not equipped to handle the medical crisis that would ensue when trying to address COVID-19 within the jail.⁶ Jails are also at greater risk of infection because people are constantly being booked and released, potentially exposing other inmates and staff to COVID-19. The Board made a similar change at the request of DOC to manage prison overcrowding several years ago, allowing the inmates to be immediately released upon a grant of parole, rather than having to wait two months. This change would merely allow those who are most at risk, or who are placed in locations where their presence creates extreme vulnerability both to inmates and staff, to be seen by the Board, and released if appropriate. The public supports releasing especially at-risk populations. Fifty-eight percent (58%) of voters support releasing incarcerated people who are elderly; while fifty-three percent (53%) support releasing those whom the Center for Disease Control and Prevention (CDC) has classified as vulnerable, including those with asthma, cancer, heart disease, lung disease, and diabetes.⁷
 - c. Release **all persons within 180-days** of their anticipated release date. It is unknown how long Kentucky will be under the threat of coronavirus infection, illness, and death. If a detention center or prison were to become infected with the virus, the Health Department may be forced to place the facility on “lock-down,” not allowing people to be processed in, or out, of the facility. Were a lock-down to occur during a time when inmates would otherwise be eligible for release, and they were to then become ill or die, it would not only offend the values of our justice system, it could also result in unknown liability to the state and counties. Fifty-six percent (56%) of voters support releasing people who are within six months of completing their sentence in order to reduce the risk of transmitting the coronavirus within jails and prisons.⁸
3. **Automatic Release of Non-Violent Low Risk Offenders:** According to the Board’s data, low-risk offenders predictably have the lowest rates of recidivism. At a time when the resources of the Parole Board and the Department of Corrections are stretched thin, the Board should consider automating release for low-risk offenders.
 4. **Suspend Technical Violation Revocations of Parole.** We believe the Parole Board should suspend the use of incarceration for technical parole violations (e.g. nonpayment of fines, reporting violations), except where necessary in individualized instances to protect public safety. Cases where revocation is sought primarily based on the failure to

⁶ Danielle Ivory, ‘We Are Not a Hospital’: A Prison Braces for the Coronavirus (March 17, 2020)

<https://www.nytimes.com/2020/03/17/us/coronavirus-prisons-jails.html>.

⁷ *Fighting the Coronavirus with Decarceration: Policies & Polling*, Data for Progress (March 2020),

<http://filesforprogress.org/memos/fighting-coronavirus-with-decarceration.pdf>.

⁸ *Fighting the Coronavirus with Decarceration: Policies & Polling*, Data for Progress (March 2020),

<http://filesforprogress.org/memos/fighting-coronavirus-with-decarceration.pdf>.

complete a program should immediately be offered a parole continuation sanction under KRS 439.3401(2). A reduction in the number of people going into the prison system on technical violations will better enable staff to spend their time supervising only those people who need to be in custody during the pandemic.⁹

The safety of corrections officers and other personnel can only be ensured with a reduced prison population. The special vulnerability of prisons and jails to infectious disease, and particularly COVID-19 is readily apparent from the Coronavirus outbreak in China. Coronavirus suddenly “exploded” in China’s prison, with reports of more than 500 cases spreading across five facilities in three provinces.¹⁰ As of February 25, 2020, there were 555 confirmed infections in five prisons of three provinces — Hubei, Shandong, and Zhejiang.¹¹ In addition, other U.S. states which experienced earlier contact with the virus have already begun to confront the contribution of jails to the spread of the disease both within and without the jail.¹² Additional data compiled by the Prison Policy Initiative demonstrates the risk that jail contamination poses to the community at large due to post-infection release of contaminated inmates.¹³ Action taken now to release incarcerated persons will help to curtail this risk. Additionally, the alarming riots in Italy highlight the risk posed to DOC employees when prison populations exceed numbers intended for the facilities during this uncertain time.¹⁴

These requests are not without precedent across the U.S. and abroad at this time. Iran temporarily released at least 70,000 individuals from its prisons¹⁵, and Italy is facing prison riots over lockdown conditions and overcrowding that have led to at least 50 escapes and six deaths.¹⁶ New York City, which has confirmed COVID-19 cases among its population and staff, including the death of one staff member, is identifying individuals for release, including those arrested for minor crimes and those most vulnerable to infection due to underlying health problems.¹⁷ Additionally, Los Angeles County, with a jail population similar in size to Kentucky’s prison population, has reduced its number by 600 in the past two weeks, and Cuyahoga County, OH, has reduced its inmate population by hundreds. These actions reflect a recognition across the country and around the world that it is necessary to reduce the population of incarcerated people to stem the rise of infection and to prevent collateral catastrophic consequences.

Kentucky faces a particularly critical risk, with over 24,000 people incarcerated in DOC facilities, representing the 10th highest per capita incarceration rate in the country. Without a doubt, COVID-19 threatens amplified pressure to our already strained system.

⁹ Centers for Disease Control and Prevention, *Coronavirus Disease 19 (COVID-19): People at Higher Risk* (March 10, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html>.

¹⁰ Claudia Lauer and Colleen Long, *US Prisons, Jails on Alert for Spread of Coronavirus*, NBC News (March 7, 2020), https://www.nbcwashington.com/news/coronavirus/us-prisons-jails-spread-of-coronavirus/2233762/?_osource=db_npd_nbc_wrc_twt_shr.

¹¹ Zi Yang, *Cracks in the Chinese System: COVID-19 in Chinese Prisons*, The Diplomat (March 9, 2020), <https://thediplomat.com/2020/03/cracks-in-the-system-covid-19-in-chinese-prisons/>.

¹² Nicole Wetsman, *Prisons and Jails are Vulnerable to COVID-19 Outbreaks*, The Verge (March 7, 2020), <https://www.theverge.com/2020/3/7/21167807/coronavirus-prison-jail-health-outbreak-covid-19-flu-soap>; Jason Pohl, *California Jails, Prisons on Alert for Coronavirus, Fear It Will ‘Spread Like Wildfire’*, The Sacramento Bee (March 6, 2020), <https://www.sacbee.com/news/california/article240962761.html>.

¹³ Peter Wagner and Emily Widra, *No Need to Wait for Pandemics: The Public Health Case for Criminal Justice Reform*, Prison Policy Initiative (March 6, 2020), <https://www.prisonpolicy.org/blog/2020/03/06/pandemic/>.

¹⁴ Reuters, *Death Toll Rises from Italy’s Coronavirus Prison Riots* (March 10, 2020), <https://www.reuters.com/article/us-health-coronavirus-italy-prisons/death-toll-rises-from-italys-coronavirus-prison-riots-idUSKBN20X2DG>.

¹⁵ Reuters, *Iran Temporarily Releases 70,000 Prisoners as Coronavirus Cases Surge* (March 9, 2020), <https://www.reuters.com/article/us-health-coronavirus-iran/iran-temporarily-releases-70000-prisoners-as-coronavirus-cases-surge-idUSKBN20W1E5>.

¹⁶ Nicole Winfield, *Prison Riots Hit Italy Amid Virus; 6 Die in Overdose*, ABC News (March 9, 2020), <https://abcnews.go.com/Health/wireStory/italian-inmates-die-protest-virus-measures-69482325>.

¹⁷ BBC News, *US Jails Begin Releasing Prisoners to Stem Covid-19 Infections* (March 19, 2020), <https://www.bbc.com/news/world-us-canada-51947802>.

Requests and Recommendations to Kentucky Department of Corrections: Health and Safety in Correctional Facilities:

- 1. Limit the use of parole revocation in cases involving technical violations.** CPP 27-15-03 was designed to encourage the use of graduated sanctions. Unfortunately, it allowed two significant gaps. First, “absconding”, which the regulation does not define, is a ground to seek return to the releasing authority. The lack of definition has resulted in cases being characterize as “absconding” for a mere failure to report. This can be addressed by defining “absconding” to require either direct evidence of an intent to evade supervision (such a statement by the offender) or a failure to respond to attempts at contact over an extended period. The second issue is that the graduated sanctions may be bypassed with supervisor approval. DOC may direct that supervisors are not to approve deviation from the graduated sanctions matrix without a serious threat to public safety.
- 2. Identify the medically at-risk population:** Based on a conversation with Acting Commissioner Randy White, we believe this may be underway and it is an important step. As this issue moves forward, the courts, paroling authorities and others need to be reliably informed about the extent of the at risk population within DOC. This will enable action by courts and the Parole Board to help mitigate the risk.
- 3. Reduce the population in local jails:** As noted above, inmates at local jails are the most at risk. Most local jails have no capacity to isolate an infected inmate, as recommended by the CDC, and are required to take anybody arrested within the county or jurisdiction they cover, putting them at high risk for eventual exposure. In addition to those who are placed in local jails under the Department of Corrections’ discretionary authority, the department is authorized to transfer inmates out of C or D facilities when desired by the jailer under KRS 532.100(5). Whenever possible, the Department of Corrections should exercise that authority liberally to reduce the population of inmates in local facilities.
- 4. Comply with CDC, Kentucky Department of Public Health, and National Commission on Correctional Health Care (NCCHC) Guidelines.** We urge the Department of Corrections to be in regular contact with experts at the CDC, Department of Public Health, and National Commission on Correctional Health Care (NCCHC). In particular, we ask DOC to follow guidelines by the CDC in its *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, issued on March 23, 2020, as well as those issued by NCCHC and its partners at Emory University, accessible here: <https://www.ncchc.org/blog/covid-19>.¹⁸
- 5. Ensure Access to Soap, Tissue, Cleaning/Sanitizing Products, and Clean Laundry.** People in prison should be given increased supplies of soap, tissue (or toilet paper), and cleaning/sanitizing products. Additional steps should be taken to ensure that people have clean laundry on a regular basis. Cleaning and sanitizing products should be provided and available at no cost to incarcerated people.

¹⁸ Centers for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (March 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#Lim> Onsite.

6. **Ensure Transparency in Communications with Family Members and the Public.** Policies adopted in response to COVID-19 should be transparent and clearly communicated to the public and to people in prison. This includes providing regular updates, via press releases and on the DOC website, about the spread of the virus and the measures being taken to address it. Prison officials should have a plan to address an anticipated increase in the number of calls from family members seeking information.
7. **Implement Medical Quarantine Where Appropriate.** In consultation with experts at the CDC and/or the Department of Public Health, prison medical providers should develop a medical quarantine plan for people who have been exposed to COVID-19. This plan should consider how to isolate people with the virus; how long to quarantine those who are exposed; what personal protective equipment is needed, and for whom; and when isolation can safely be lifted. Any plans for quarantine should be non-punitive, and limited in scope and duration based on the best science available.
8. **Take Steps to Mitigate Effects of Medical Quarantine.** Periods of medical quarantine may be stressful for both incarcerated people and staff. We urge DOC to ensure that those who are quarantined have positive ways to spend time, including reading materials, tablet access, electronic programming, crossword puzzles, and the like.¹⁹ Access to time on the prison yard is particularly important. These measures will help to keep tensions and anxiety levels down and support good mental health.
9. **Ensure that Incarcerated People Can Meaningfully Contribute to their Legal Case.** People who are in prison should continue to have access to regular communication with their legal team, and access to court proceedings.
10. **Implement Emergency Staffing Plan.** DOC and its medical providers should develop and continually update a plan to reinforce staffing and provide for effective care in the event of a mass outbreak at facilities where vulnerable populations are housed. If not already in place, DOC should implement paid sick leave to encourage staff members not to come to work if they are ill.
11. **Create a Plan for Transfers of People Whose Care Cannot Be Safely Managed in Prison.** I urge DOC and its medical providers to plan for how they will accommodate a possible need to transfer a large number of people to hospitals, ASMP, or elsewhere, for advanced levels of care.

We appreciate the Department of Corrections' concern with the well-being of the incarcerated individuals in its care. In addition to mitigating risks to the population and staff, implementing the recommendations herein will also help the Department avoid potential liability. Failure to take reasonable steps to reduce hazards

Because this matter is of the utmost importance to our clients and their loved ones, we are sharing this letter publicly. We appreciate the steps that your agencies are taking to respond to COVID-19.

¹⁹ Anne C. Spaulding, MD MPH, *Coronavirus COVID-19 and the Correctional Facility*, Emory Center for the Health of Incarcerated Persons (March 9, 2020), [https://www.ncchc.org/filebin/news/COVID for CF. HCW 3.9.20.pdf](https://www.ncchc.org/filebin/news/COVID%20for%20CF%203.9.20.pdf).

We urge you to adopt the additional measures listed in this letter, for the protection of people in prison, correctional staff, and the public at large. Thank you for your consideration.

Sincerely,



Damon L. Preston
Public Advocate
Department of Public Advocacy



Timothy Arnold
Post Trial Division Director
Department of Public Advocacy