

FEDERAL DEFENDERS OF SAN DIEGO, INC.

THE COMMUNITY DEFENDER ORGANIZATION FOR THE SOUTHERN DISTRICT OF CALIFORNIA

March 31, 2020

Senator Kamala D. Harris
U.S. Senator for California
112 Hart Senate Office Building
Washington, D.C. 20510

Re: Risk of COVID-19 to Detained People in the Southern District of California

Dear Senator Harris,

We at the Federal Defenders of San Diego thank you for your efforts to protect the federal prison population from COVID-19, including by co-sponsoring the “Emergency Community Supervision Act of 2020.” We also appreciate the Senate’s refusal to adopt the Department of Justice’s proposed legislation severely curtailing our clients’ procedural rights. We are grateful that the recently signed CARES Act protects our clients’ right to consent or refuse to consent to pleas/sentencings in their absence and we thank you for your support of such an important principle.

Despite these positive steps, we write to share our belief that much more should be done to protect the health and well-being of our clients, our staff, and other members of the Court system. As you are aware, every day that our clients remain in an unsafe environment increases the risk to their health, the health of everyone participating in court proceedings in the Southern District of California, and indeed, the public at large. Therefore, we are providing you with the following critical information in the hope that you can educate the other members of the Senate Judiciary Committee about the imminent danger so many in Southern California are facing and the particular areas that should be addressed immediately.

Most of our clients are charged with non-violent crimes such as immigration status offenses. Although the United States Attorney’s Office (USAO) for the Southern District of California has reduced new prosecutions and offered favorable resolutions in many cases, it has continued to ignore the risk of COVID-19 when making crucial prosecutorial decisions—most notably on whether to agree to pre-trial release for detained people.

The USAO rejects COVID-19 as a basis for recommending bail for clients awaiting trial. Prosecutors have consistently denied requests by defense attorneys to agree to bond based on COVID-19-related risks. For example:

- One Assistant U.S. Attorney refused to reduce the bond amount for a client accused of a misdemeanor illegal entry offense, dismissing COVID-19 concerns as “unsubstantiated and unwarranted.”¹ The client has already been in pre-trial detention for seven months, a month longer than the statutory maximum penalty for the offense.
- A March 20th email from an Assistant U.S. Attorney in another immigration status-offense case indicates that prosecutors’ refusal to consider the pandemic is a matter of office policy:

¹ See United States’ Opposition to Defendant’s Motion to Amend Conditions of Release, *United States v. Espinoza*, 19-CR-4609, ECF No. 32.

Sen. Kamala Harris
March 31, 2020

“I have not received authorization to change our positions [on bail] based on a potential COVID-19 outbreak in the prison population,” the prosecutor said.

- On March 27th, another prosecutor opposed defense counsel’s request to advance a bond hearing for COVID-19 reasons, stating “I don’t understand why this defendant as opposed to every other defendant in federal custody needs an emergency bond hearing. . . . If the Court is granting expedited bond hearings for every defendant that requests them, than [sic] please let me know so that I can inform my management to be aware of that.”

The USAO has refused to agree to bond even where detainees face an especially high risk of contracting COVID-19 and suffering potentially fatal consequences. For example, the USAO opposed bond for a 64-year-old Vietnam veteran charged with a non-violent offense who suffers from PTSD, skin cancer stemming from Agent Orange exposure (for which he requires ongoing treatment), and chronic heart problems resulting in three prior heart attacks and recent heart surgeries. Instead, the man has been placed in a “quarantine” unit with eight other men, including recently arrested individuals and a bunkmate who has been coughing incessantly over the past week.

In its filings opposing bond, the USAO argues that because there are no known cases of COVID-19 in a local federal jail, the risks to our clients are “speculative,” and “unsubstantiated and unwarranted.”² On March 20, 2020, an Assistant U.S. Attorney stated in an email that my office’s argument for bond “presumes that there’s a larger/greater risk of contracting COVID-19 within the MCC than anywhere else, thereby creating a greater risk that more would be infected by the nature of confinement. However, the last I heard, there were no reported cases of COVID-19 within the MCC.” The USAO’s position ignores the current conditions in our local jails,³ lack of testing of detainees, the exponential spread of the disease throughout the country, and public health experts’ warnings that jails will soon become epicenters of the COVID-19 outbreak.⁴ Meanwhile, there are at least five known cases in the Orange County jail, which houses U.S. marshals’ inmates from San Diego (albeit in a separate building), and a nurse at a San Diego County women’s jail has also tested positive.⁵

As cases of COVID-19 begin to spread throughout jails in Southern California, we are concerned that the USAO is not recognizing a ticking time bomb. Phone calls and emails with our clients indicate that they are concerned about unsanitary and crowded conditions. One facility has no hand sanitizer

² See, e.g., United States’ Opposition to Defendant’s Motion to Amend Conditions of Release, *United States v. Mayne-Garcia*, 20-mj-0780, ECF No. 14; see also United States’ Opposition to Defendant’s Motion to Amend Conditions of Release, *United States v. Tabares-Salinas*, 20cr437, ECF No. 12 (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”).

³ See Declaration of Joshua Jones, Senior Litigator at Federal Defenders of San Diego, Inc. (Mar. 31, 2020) (attached).

⁴ See, e.g., Letter from 45 public-health experts to President Trump, Mar. 27, 2020, <https://thejusticecollaborative.com/wp-content/uploads/2020/03/Public-Health-Expert-Letter-to-Trump.pdf> (warning that federal detention facilities “are tinderboxes, ready to explode and endanger our entire country”); Declaration of Chris Beyrer, Professor of Epidemiology, Johns Hopkins Bloomberg School of Public Health (Mar. 16, 2020) (“It is [] an urgent priority in this time of national public health emergency to reduce the number of persons in detention as quickly as possible. . . . Releasing as many inmates as possible is important to protect the health of inmates, the health of correctional facility staff, the health of health care workers at jails and other detention facilities, and the health of the community as a whole.”).

⁵ Tony Saavedra, *Federal court order sought to shut down OC jail because of coronavirus exposure*, The Orange County Register, (Mar. 30, 2020) <https://www.ocregister.com/2020/03/30/federal-court-order-sought-to-shut-down-oc-jail-because-of-coronavirus-exposure/>; *Nurse at La Colinas Women’s Jail Tests Positive for COVID-10*, San Diego Union Tribune, (March 26, 2020) <https://www.sandiegouniontribune.com/news/liveblog/coronavirus-live-updates-march-23#nurse-at-la-colinas-womens-jail-tests-positive-for-covid-19>.

Sen. Kamala Harris
March 31, 2020

or place to wash hands in the cafeteria; in others, inmates are sleeping with over 25 people in a room, with minimal space between bunks. At least three facilities have people exhibiting symptoms such as severe coughing, but with delayed or no medical follow-up. At one facility, inmates are receiving no information about COVID-19 apart from what they see on TV, and are not self-reporting symptoms in part because they don't want to be placed in the Special Housing Unit ("SHU"), i.e. solitary confinement.⁶

Some Assistant U.S. Attorneys have stated that our clients might be safer from COVID-19 inside the jail than outside. On March 24th, an Assistant U.S. Attorney e-mailed: "I do not agree that the COVID-19 issue creates extraordinary circumstances for in-custody inmates. . . .One Magistrate Judge recently remarked that inmates at the MCC may be safer than the general population, and the [magistrates] have thus far rejected requests to modify bail in light of the issue."

This position is not limited to rogue line prosecutors—it is also espoused by supervising prosecutors, including one who told defense counsel when refusing to agree to a release on bond that she believed the person would be safer in jail, noting that the local detention facilities still had not reported cases of COVID-19 and were controlling who entered and left the facility.

The USAO is also holding the pandemic's economic fallout against our clients. They have argued that our clients' family members do not qualify as adequate sureties for bonds *because they have lost their income due to COVID-19*.

In addition to endangering public health, the refusal to consider COVID-19 also threatens due process by having an enormously coercive effect on those deciding whether to plead guilty. Many clients detained before trial due to the USAO's bail recommendations must choose between fighting their cases and risking exposure to COVID-19 in jail or quickly pleading guilty with the hope of immediate release. All motion hearings and trial dates have been moved out at least a month, and it remains uncertain when jury trials will begin again. Understandably, many will plead guilty to avoid infection.

Senator Harris, we know you are all too aware that jails are uniquely dangerous settings for COVID-19, both in terms of transmission and poor health outcomes. As you are also aware—and as is often overlooked—a COVID-19 crisis in our jails will greatly exacerbate the pandemic in our communities. Sick inmates will need to be sent to already overwhelmed community hospitals. The hundreds of jail staff and healthcare workers who enter and leave facilities every day risk transmitting the virus from the jail to their families and communities, and vice versa.⁷ Furthermore, in our district, where the courts remain open, detainees continue to travel back and forth between jails and court, putting them in close proximity to dozens of other people, including other inmates, U.S. Marshals, court staff, judges, interpreters, and FDSOI attorneys and investigators. "For this reason, correctional health is public health. . . . Decreasing risk in prisons and jails absolutely decreases the risk to our communities."⁸

We urge you to help adopt urgent measures to protect detainees—and the local community—from COVID-19. The USAO should immediately take steps to release individuals in pre-trial custody who

⁶ Questionnaires and interviews may be made available upon request.

⁷ See, e.g., Comments of Dr. Brie Williams, UCSF Medical School, *Press Conference at MDC Calling for Release on March 22, 2020*, <https://federaldefendersny.org/about-us/news/press-conference-at-mdc-calling-for-release.html> .

⁸ *Id.*

Sen. Kamala Harris
March 31, 2020

do not pose a “risk of serious injury to a reasonably identifiable person.”⁹ Specifically, absent such a risk or other extraordinary circumstances in a particular case, the USAO should:

- (1) halt the pretrial detention of new, non-violent arrestees and instead issue notices to appear;
- (2) agree to release for current pretrial detainees on their own recognizance; and,
- (3) reconsider charging, sentencing, and dismissal decisions in light of the public health risks associated with the continued detention of non-violent offenders.

The continued detention of these individuals is not necessary to ensure their appearance in court, or community safety. In 2019, 99% of released federal defendants nationwide appeared for court, and over 98% were not re-arrested while on bond.¹⁰ Indeed, insisting upon the continued pre-trial detention of individuals in jails that are unequipped to prevent the spread of COVID-19 presents a much greater threat to community safety than release.

The dramatic spread of COVID-19 on Rikers Island is an instructive lesson that we must learn from. In the Southern District of California, it is not too late. The USAO is uniquely positioned to save many lives in California, and we urge you to investigate whether they wield this power wisely and, if not, to take legislative action that will speed up the immediate release of as many inmates as possible. Such action could include temporary amendments to the Bail Reform Act citing COVID-19 as an acceptable factor to consider when making a determination whether pre-trial release is appropriate.

Another example of a legislative fix to decrease unnecessary detentions would be the temporary expansion of Rule 35 of the Federal Rules of Criminal Procedure to authorize revisiting sentences for individuals who suffer from medical conditions that could result in their death if exposed to COVID-19. Also, amending the First Step Act to include infection with COVID-19 as a ground for compassionate release could clear out sick individuals from the jails and enable them to get appropriate medical care and retreat to social isolation to reduce the spread to other inmates and prison personnel.

It is our sincere hope that educating you about what we are experiencing in the Southern District will assist you in your continuing efforts to protect and defend the health and safety of our clients, our staff and so many individuals who make up our criminal justice system. Please do not hesitate to reach out to me if you have any questions or need additional information. Please take care of yourself as you carry out the duties of your office and represent us in Washington D.C.

Respectfully,

Kathryn N. Nester
Executive Director

⁹ On March 19, 2020, Members of Congress Jerrold Nadler and Karen Bass sent a letter to Attorney General William Barr stating that “Line lawyers should not be reflexively seeking detention in court, but should give serious consideration to whether the person they seek to detain poses a risk of serious injury to a reasonably identifiable person.”

¹⁰ 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 re-arrest rate of 1.9% in 2019).