

# FEDERAL DEFENDERS OF SAN DIEGO, INC.

THE COMMUNITY DEFENDER ORGANIZATION FOR THE SOUTHERN DISTRICT OF CALIFORNIA

July 24, 2020

The Honorable Kamala D. Harris  
United States Senate  
112 Hart Senate Office Building  
Washington, D.C. 20510

Re: Continuing issues faced by federal detainees in the Southern District of California

Dear Senator Harris,

We are grateful for your continued interest in COVID-19's impact on federal detainees and criminal cases in the Southern District of California ("SDCA"). We are writing to give you an update on the concerns we raised in our March 31, 2020 letter. Unfortunately, since then, the risks to our clients—as well as our staff and Southern California communities—have increased, rather than abated. The increased danger stems from escalating prosecutions and the reopening of in-person court proceedings in our district, despite escalating COVID-19 infections in local jails and communities. These prosecutions are occurring on an uneven playing field, as the pandemic is undermining our clients' constitutional rights to a speedy trial and to confidential communication with their lawyers.

**1. The United States Attorney's Office has substantially increased new prosecutions over the past several weeks.**

The United States Attorney's Office ("USAO") has reversed course on the single most important measure it took to curb the spread of COVID-19. Our March 31 letter to you credited the USAO for reducing new prosecutions in order to decrease the jail population during the pandemic. Yet over the past several weeks, the USAO has dramatically increased new prosecutions. In the three-week period between June 29 and July 17, the USAO filed 223 new, unsealed complaints, compared to 83 in the three weeks prior. The vast majority of these new cases are for non-violent charges such as being a low-level drug courier or illegally crossing the border after having previously been deported.<sup>1</sup>

The USAO is increasing prosecutions while simultaneously winding down its practice—instituted at the beginning of the pandemic—of issuing Notices to Appear instead of arresting and detaining many defendants. The result is a growing jail population, which increases the risk of COVID-19 transmission.

The risk of COVID-19 infection in our jails and communities has increased since we last wrote you:

- **Conditions at local jails.** When we wrote you, there was just one confirmed COVID-19 case in the local jails housing our clients. Now there are confirmed cases at eight detention facilities

---

<sup>1</sup> Many of the charges are against people with drug addictions who are accused of carrying drugs on their bodies across the border. These body carrying drug "mules" are at the very bottom of the drug-trade hierarchy.

housing our clients,<sup>2</sup> including a significant outbreak at the GEO facility in El Centro, where 31 U.S. Marshals Service detainees tested positive over a five-day span in the beginning of July. As of July 17, 44 U.S. Marshals Service detainees at that facility had tested positive. There have been 285 confirmed COVID-19 cases at Core Civic's Otay Mesa Detention Center, where one ICE detainee has died. We applaud the letter you wrote to the Department of Homeland Security (DHS)'s Inspector General calling for an investigation into what you described as "horrifying" and "unacceptable" conditions at that facility.<sup>3</sup> After your letter, we heard reports of some improvements in the facility and saw a drop in the infection rate. As recently as this week, we were advised of an outbreak at Correctional Alternatives Inc., the BOP contracted residential reentry center in San Diego. Intakes have been suspended for at least two weeks.

- **Lack of testing, reporting, and transparency at local jails.** Local detention facilities still are not systematically testing detainees for COVID-19. For example, the latest available figures, as of July 17, showed that, since the beginning of the pandemic, just five of the 489 U.S. Marshals Service detainees at GEO's Western Regional Detention Facility in San Diego had been tested. More generally, while we receive weekly updates on test results from the U.S. Marshals Service, the district's detention facilities have failed to provide transparent and regularly updated information concerning their COVID-19 testing protocols.
- **Conditions in California and SDCA communities.** California's 7-day average of daily new confirmed COVID-19 cases on July 17 (9,060) was ten times more than the 7-day average on March 31 (848).<sup>4</sup> Since we wrote you, the number of daily new cases has soared in the SDCA, which encompasses San Diego County and Imperial County.<sup>5</sup> Imperial County, the home to a magistrate court and detention center for our district, has the highest rate of COVID-19 infections of any county in California, at 4,282 cases per 100,000 people.<sup>6</sup> A hospital CEO in El Centro, the

---

<sup>2</sup> These facilities include San Diego's MCC; Otay Mesa Detention Center; Orange County Jails; San Luis Regional Detention Center; GEO's El Centro Detention Center; FCI and USP Victorville; Santa Ana City Jail; and GEO's Western Region Detention Facility.

<sup>3</sup> Senator Kamala D. Harris, *Harris Statement on Inhumane Conditions at Otay Mesa Detention Center*, (Apr. 12, 2020), [https://www.harris.senate.gov/news/press-releases/harris-statement-on-inhumane-conditions-at-otay-mesa-detention-center\\_](https://www.harris.senate.gov/news/press-releases/harris-statement-on-inhumane-conditions-at-otay-mesa-detention-center_).

<sup>4</sup> Johns Hopkins Coronavirus Resource Center, *Impact of Opening and Closing Decisions by States – California*, <https://coronavirus.jhu.edu/data/state-timeline/new-confirmed-cases/california>.

<sup>5</sup> County of San Diego, Health & Human Services Agency, *COVID-19 Cases in San Diego County by Illness Onset Date*, <https://www.sandiegocounty.gov/content/dam/sdc/hhsa/programs/phs/Epidemiology/COVID-19%20Cases%20by%20Date%20of%20Illness%20Onset.pdf>.

<sup>6</sup> Centers for Disease Control and Prevention (CDC), *Cases & Deaths by County*, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/county-map.html>.

town in Imperial County where the court and jail are located, compared his hospital's situation to a "war zone."<sup>7</sup>

No new developments in the medical or scientific understanding of COVID-19 suggest that our clients are any safer in jail now than when the USAO began decreasing prosecutions in March. To the contrary, on June 25, the Centers for Disease Control and Prevention (CDC) updated their policies to recognize that Latinx people—who comprise the majority of our clients—"need extra precautions" with respect to COVID-19.<sup>8</sup> Ramping up prosecutions—and thereby incarcerating more people of color in dangerous jail conditions—exacerbates the staggeringly unequal ethnic and racial impact of COVID-19.

In sum, prosecutions of non-violent drug or immigration-related cases are significantly increasing despite the (1) escalation of COVID-19 rates in our communities and jails, (2) the lack of systematic COVID-19 testing and transparency concerning the virus's presence in detention facilities, and (3) the absence of any scientific information indicating that jails are any less dangerous than we knew them to be when we wrote you in March.

## **2. The increase in prosecutions is coinciding with the resumption of mandatory in-person court proceedings.**

On May 26<sup>th</sup>, our Court established a Strategic Committee to collaborate on implementing safety protocols to lessen the risk of COVID-19 exposure for all parties and visitors in the federal courthouses. All the various Court agencies, including our office and the United States Marshals and the United States Attorney's Office, have spent many hours trying to make the courthouse a safer environment. An increase of in-person court proceedings, however, threatens the accomplishments of the Strategic Committee.

The Chief Judge of the SDCA's July 9 decision to increase in-person court proceedings compounds the dangers created by the USAO's increase in prosecutions. On March 30, the Chief Judge of the SDCA issued an order declaring that felony guilty pleas and sentencings "cannot be conducted in person in this district without seriously jeopardizing public health and safety."<sup>9</sup> Therefore, pursuant to the CARES ACT, the order authorized felony pleas and sentencings to proceed by telephone or

---

<sup>7</sup> "It's a war zone": Tents mounted in Imperial County hospital parking lot to handle surging COVID-19 cases, KTLA-5, (July 9, 2020), <https://ktla.com/news/california/its-a-war-zone-tents-mounted-in-imperial-county-hospital-parking-lot-to-handle-surg-ing-covid-19-cases/>.

<sup>8</sup> CDC, *Racial & Ethnic Minority Groups*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html>; see also Richard A. Opiel Jr. et al., *The Fullest Look Yet at the Racial Inequity of Coronavirus*, N.Y. Times (July 5, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html>.

<sup>9</sup> United States District Court for the Southern District of California, *Order of the Chief Judge No. 20*, (Mar. 30, 2020), [https://www.casd.uscourts.gov/\\_assets/pdf/rules/Order%20of%20the%20Chief%20Judge%2020.pdf](https://www.casd.uscourts.gov/_assets/pdf/rules/Order%20of%20the%20Chief%20Judge%2020.pdf).

videoconference. On June 26, the Chief Judge extended the order, because it remained warranted to “protect the public safety and prevent the spread of COVID-19,” given that “[m]any of the circumstances giving rise to the COVID-19 public emergency have not abated since the entry of” the order on March 30.<sup>10</sup>

Yet, on July 9, two days after San Diego County reinstated restrictions on indoor activities amidst rising cases,<sup>11</sup> the Chief Judge issued a new order requiring that, beginning July 20, all guilty pleas and sentencings be conducted in person.<sup>12</sup> Despite rising COVID-19 cases in San Diego County, the July 9 order withdraws the Chief Judge’s previous finding that guilty pleas and sentencings “cannot be conducted in person without seriously jeopardizing public health and safety.”<sup>13</sup> To justify the policy change, the order cites that the Bureau of Prisons (BOP) authorized the U.S. Marshals to resume bringing detained defendants to court beginning on July 6, as long as they quarantine in jail for 14 days following each court appearance.<sup>14</sup> But, to date, BOP protocols have not effectively protected incarcerated people from COVID-19: the BOP has a 7.1 percent infection rate in its facilities—much greater than reported in the general population—and has had 98 people die of COVID-19 in its custody. Four additional people have died in private facilities.

We believe it remains true that, as the Chief Judge previously found as recently as June 26, in-person guilty pleas and sentencings cannot occur “without seriously jeopardizing public health and safety,” especially in light of the escalating infection rates in our district and country.

---

<sup>10</sup> United States District Court for the Southern District of California, *Order of the Chief Judge No. 31*, [https://www.casd.uscourts.gov/\\_assets/pdf/rules/Order%20of%20the%20Chief%20Judge%2031.pdf](https://www.casd.uscourts.gov/_assets/pdf/rules/Order%20of%20the%20Chief%20Judge%2031.pdf).

<sup>11</sup> City of Oceanside, *San Diego County Joins State Watch List; Certain Business Operations Rolled Back*, (July 6, 2020) <https://www.ci.oceanside.ca.us/news/displaynews.asp?NewsID=1862&TargetID=1>.

<sup>12</sup> United States District Court for the Southern District of California, *Order of the Chief Judge No. 20*, [https://www.casd.uscourts.gov/\\_assets/pdf/rules/Order%20of%20the%20Chief%20Judge%2031-A.pdf](https://www.casd.uscourts.gov/_assets/pdf/rules/Order%20of%20the%20Chief%20Judge%2031-A.pdf). The order has an exception providing that “[a]ttorneys who for health or other exceptional reasons are unable to appear in-person with their clients may file a motion with the Court prior to the plea or sentencing seeking leave to appear telephonically or by videoconferencing.”

<sup>13</sup> On July 13, the Chief Judge exempted the courthouse in Imperial County from the July 9 order because of rising cases there. United States District Court for the Southern District of California, *Order of the Chief Judge No. 20*, [https://www.casd.uscourts.gov/\\_assets/pdf/rules/Order%20of%20the%20Chief%20Judge%2031-B.pdf](https://www.casd.uscourts.gov/_assets/pdf/rules/Order%20of%20the%20Chief%20Judge%2031-B.pdf).

<sup>14</sup> The July 9 order cites the “extensive public safety measures taken by the Court, by BOP, and by the U.S. Marshals to prevent the spread of COVID-19 within the Court complex.”

**3. The increasing prosecutions are against clients with reduced constitutional safeguards.**

Requiring detainees to quarantine for 14 days after each court appearance effectively precludes trials, because defendants cannot be brought to court on consecutive days. So the government will bring clients to court to plead guilty, but not to exercise their constitutional right to a speedy trial.

The right to a speedy trial is not the only Sixth Amendment right suffering during this pandemic. FDSDI attorneys rely on legal phone calls with detained clients, given that safety concerns have prevented in-person visits. But at most facilities, legal calls are not reliably confidential, because the clients often are forced make them in the presence of staff and/or other detainees. The jails' failure to provide defense attorneys with reliable and confidential phone or videoconference calls with detained clients is severely undercutting their Sixth Amendment right to effective assistance of counsel.

An uneven playing field results from the undermining of our clients' constitutional rights to a speedy trial and effective assistance of counsel during this pandemic. The unfairness of the proceedings is another reason—in addition to public health—why the USAO should decrease prosecutions.

**4. Recommendations to avoid another San Quentin.**

We do not want our district to experience a disastrous—and preventable—outbreak like the one ravaging San Quentin State Prison. As you are aware, that outbreak has killed at least 15 incarcerated people and infected more than 2,000, resulting in the transfer of many to already strained Bay Area community hospitals.<sup>15</sup> In response to the outbreak, the California Department of Corrections and Rehabilitation (CDCR) announced it would make 8,000 currently incarcerated people eligible for release.<sup>16</sup> The USAO is moving in the opposite direction by ramping up prosecutions, thereby placing incarcerated people and surrounding California communities at greater risk.

As you noted in your letter to BOP Director Carvajal on March 19, 2020, there is much more the government can do to protect low-risk, vulnerable detainee populations. We support your efforts to bring these matters to the attention of DOJ and BOP and we urge you to continue to request the following measures to protect detainees in the Southern District of California and our communities:

- The Department of Justice should be taking reasonable steps to reduce the incarcerated population including but not limited to: directing local USAOs to reduce prosecutions, encouraging widespread pretrial release, issuing Notices to Appear rather than arresting and detaining, directing local USAOs to take into consideration medical vulnerabilities when

---

<sup>15</sup> Harmeet Kaur and Stella Chan, *At least 15 prisoners at a California prison have died of apparent complications from Covid-19*, CNN, (July 23, 2020) <https://www.cnn.com/2020/07/23/us/california-san-quentin-coronavirus-inmates-trnd/index.html>

<sup>16</sup> California Department of Corrections and Rehabilitation, *CDRC Announces Additional Actions to Reduce Population and Maximize Space Systemwide to Address COVID-19*, (July 10, 2020) <https://www.cdcr.ca.gov/news/2020/07/10/cdcr-announces-additional-actions-to-reduce-population-and-maximize-space-systemwide-to-address-covid-19/>.

July 24, 2020

Page 6

making detention/sentencing recommendations, stopping the re-incarceration of individuals for technical violations of probation/supervised release, increasing home confinement recommendations, and extending more compassionate release opportunities.

- All jails housing SDCA detainees should provide transparent and regularly updated data concerning the availability of COVID-19 testing and the protocols for same, as well as their protocols for transporting individuals in a manner consistent with CDC guidance on social distancing.
- All jails housing SDCA detainees should ensure regularly accessible confidential videoconferencing and/or telephone calls between detainees and counsel;
- Congress should amend the CARES Act so that any district judge, and not just a district's Chief Judge, may find that in-person hearings endanger the public; and
- The U.S. Marshals Service should identify all medically vulnerable individuals in their custody.

We know that in these difficult times the demands on your time are plentiful. We thank you for your continuing awareness and concern about our clients and our community.

Respectfully,



Kathryn N. Nester  
Executive Director