

April 9, 2020

Dear Governor McMaster:

Thank you for your efforts to protect the people of South Carolina from the effects of the COVID-19 pandemic. As you know, there is a consensus among public health officials that the spread of this virus poses an enormous and potentially catastrophic risk to incarcerated individuals and staff in correctional facilities. In particular, the fact that social distancing is extraordinarily difficult, if not impossible in a prison environment, makes correctional facilities especially prone to viral spread. Although some institutions have attempted some preventative measures, the situation requires a decisive, swift and coordinated statewide response by all stakeholders in the criminal legal system to save lives and to protect incarcerated individuals, staff, and the public at large.

As you have done recently with your “home or work” order,¹ you are in the unique position to coordinate and mandate the necessary response. To that end, this letter proposes a series of steps that would rapidly address many of these risks without compromising the safety of the public.

Aside from the medical evidence compelling your prompt action, there is strong public support to do so. Sixty-six percent of likely voters, including 59% of those who are “very conservative,” said that elected officials should be considering measures to reduce overcrowding in prisons and jails as a response to coronavirus.²

Infections and deaths will likely disproportionately impact people of color who are overrepresented in jails and prisons. People of color are also disproportionately represented among vulnerable populations with diabetes, heart disease, respiratory disease, and other conditions with COVID-19 co-morbidity.

Accordingly, we urge you to implement a plan that is rooted in the guidance from public health experts.³

¹ McMaster, Governor Henry, Executive Order No. 2020-22, State of South Carolina Executive Department, Filed April 7, 2020, at <https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2020-04-07%20FILED%20Executive%20Order%20No.%202020-22%20-%20Authorization%20for%20COVID-19%20Support%20Payments%20by%20Employers.pdf>

²Fighting the Coronavirus with Decarceration: Policies and Polling, Data for Progress (March 2020) (<https://www.dataforprogress.org/memos/fighting-coronavirus-with-decarceration>) (March 16, 2020 to March 17, 2020, survey of 2509 likely voters. The margin of error is ± 1.9 percent).

³Thebault, Reis, Ba Tran, Andrew, Williams, Vanessa, *The coronavirus is infecting and killing black Americans at an alarmingly high rate*, Washington Post newspaper, April 7, 2020 at

Inability to practice social distancing in prisons

For weeks, public health experts have been urgently calling for all Americans to practice social distancing, arguing that this tactic is the most effective measure to mitigate the spread of COVID-19.

Prison environments, however, are not conducive to social distancing. In fact, effective social distancing and compliance with “shelter-in-place” guidance is virtually impossible in our state prisons, due to the generally crowded conditions and the limited number of private rooms with solid doors.

Prisons are not isolated from the broader community. Each day, thousands of correctional officers and health care workers enter our prisons and return to their families and communities at the end of their shift. COVID-19 is a highly transmissible virus, including by asymptomatic carriers. Thus, it is imperative to decrease the population density inside prisons in order to reduce the transmission risk of COVID-19 inside correctional institutions and in our surrounding communities.

Federal Bureau of Prisons (BOP) and Other States Leading the Way

Given the serious public health risks posed by COVID-19, the federal and many state governments have taken steps to reduce prison populations without jeopardizing public safety, including granting early release of vulnerable incarcerated people. President Donald Trump recently signed the CARES Act into law, which included provisions to waive limits on the use of home confinement people incarcerated in federal prisons.⁴ Attorney General William Barr has since declared that the Federal Bureau of Prisons is facing emergency conditions due to the fast-paced spread of COVID-19, and issued two separate sternly worded orders to the BOP Director calling for the immediate release of vulnerable incarcerated people into home confinement following a 14-day quarantine.⁵

<https://www.washingtonpost.com/nation/2020/04/07/coronavirus-is-infecting-killing-black-americans-an-alarmingly-high-rate-post-analysis-shows/?arc404=true>

⁴ James, Nathan and Foster, Michael A. *Federal Prisoners and COVID-19: Background and Authorities to Grant Release*, Congressional Research Service, Updated April 2, 2020, at

<https://crsreports.congress.gov/product/pdf/R/R46297>

⁵ Pavlo, Walter, *AG William Barr’s Memo To Bureau Of Prisons: ‘Time Is Of The Essence,’* Forbes, Updated April 4, 2020 at

<https://www.forbes.com/sites/walterpavlo/2020/04/04/ag-william-barrs-new-memo-to-bureau-of-prisons-time-is-of-the-essence/#19d716776805>

Many states have also recognized the urgency of this pandemic and taken preemptive steps to reduce their prison populations:

- Kentucky Governor Andy Beshear signed an executive order to commute the sentences of 186 people convicted of felonies. The state also plans to release 743 people who are within 6 months of completing their sentences.⁶
- The Georgia Board of Pardons and Paroles has begun to review approximately 200 people for early release. They are considering people serving time for nonviolent offenses who are within 180 days of completing their prison sentences (or of their tentative parole date).⁷
- In an executive order, the governor of Colorado granted the director of the Department of Corrections broad authority to release people within 180 days of their parole eligibility date, and suspended limits on awarding earned time, to allow for earlier release dates.⁸
- The director of the Iowa Department of Corrections reported the planned, expedited release of about 700 incarcerated people who have been determined eligible for release by the Iowa Board of Parole. (March 23)⁹

Excerpt from Maryland Attorney General Brian Frosh's letter to Governor Larry Hogan:

*The reality is that we need a broader and faster release of a larger swath of inmates. Such action is necessary to stave off a catastrophe that will not only result in avoidable illness and death in the prisons, but will also put our correctional officers, who already put their lives on the line, at much greater risk. This increased danger will in turn augment spread of the disease in the community at large.*¹⁰

Within South Carolina, Greenville officials followed the state order from Supreme Court Chief Justice Donald Beatty¹¹ urging South Carolina judicial districts to avoid issuing bench warrants and start releasing people charged with non-violent offenses. More than 85 people, representing

⁶ Prison Policy Initiative, *Responses to the COVID-19 pandemic- Releasing people from jails and prisons*, Updated April 8, 2020 at <https://www.prisonpolicy.org/virus/virusresponse.html>

⁷ Id.

⁸ Id.

⁹ Id.

¹⁰ Gaines, Danielle, *Fresh: Release Some Inmates to Avoid Catastrophic Outbreak of COVID-19 in Prisons*, Maryland Matters, April 7, 2020 at <https://www.marylandmatters.org/2020/04/07/frosh-release-some-inmates-to-avoid-catastrophic-outbreak-of-covid-19-in-prisons/>

¹¹ Beattie, South Carolina Supreme Court Chief Justice, *The Supreme Court of South Carolina, Memo to Magistrates, Municipal Courts and Summary Court Staff re coronavirus*, March 16, 2020 at <https://sccourts.org/whatsnew/displayWhatsNew.cfm?indexId=2461>

almost seven percent of the jail's population, were released from the Greenville County Detention Center in late March.¹²

SCDC's COVID-19 Action Plan

South Carolina Department of Corrections (SCDC) has released its own COVID-19 Action Plan,¹³ in which it claims to be screening all newly arriving incarcerated people for "COVID-19 exposure risk factors and symptoms." In addition, SCDC states it is placing asymptomatic incarcerated people with exposure risk factors into quarantine; and testing and isolating symptomatic incarcerated people with exposure risk factors for COVID-19.

As has been well documented in the scientific community and recognized by our federal health agencies, testing for COVID-19 "symptoms" is not an effective tool for determining if a person has been exposed to the virus, and creates the recognized danger that asymptomatic carriers will expose dozens of people in a short period of time. As of April 9, 2020, SCDC posted on its website that 22 SCDC employees had tested positive for COVID-19, while zero incarcerated people were classified as having the virus.¹⁴ Given what we know about the spread of this disease, not only does the fact that 22 SCDC employees who have tested positive suggest that the actual spread of COVID-19 is more widespread among that employee population, but the likelihood that there are no reported cases among the prison population can only mean that the means being employed to screen incarcerated people has not been effective.

Prisons are a microcosm of the broader communities that surround them. As of April 7, 2020, South Carolina reported 2,232 confirmed COVID-19 cases, and six times as many estimated cases, 14,436.¹⁵ According to the *Post and Courier*, the state's most populated counties have the most COVID-19 cases—Richland, Charleston, and Greenville.¹⁶ Experts believe the outbreak will continue to surge throughout April, as cases have doubled over the past week.

It is logical to expect that prisons, with unsanitary conditions, populations with worse than average health outcomes, and staff and incarcerated people routinely entering and exiting, would

¹² Johnson, Kevin, *Local jails releasing hundreds of prisoners amid coronavirus fears, up from dozens just weeks ago*, USA Today, March 26, 2020 at <https://www.usatoday.com/story/news/politics/2020/03/26/jails-free-hundreds-prisoners-stop-coronavirus/5077204002/>

¹³ South Carolina Department of Corrections (SCDC) Covid-19 Action Plan, from SCDC website, at http://www.doc.sc.gov/scdc_covid-19_action_plan_031620.pdf

¹⁴ South Carolina Department of Corrections (SCDC), Covid-19 Information, from SCDC website, at <http://www.doc.sc.gov/covid.html>

¹⁵ Shain, Andy, *How SCs biggest coronavirus hot spots are spread across the state*, The Post and Courier, April 7, 2020 at https://www.postandcourier.com/health/covid19/how-scs-biggest-coronavirus-hot-spots-are-spread-across-the-state/article_db1f3996-790c-11ea-9618-d34d3c77e953.html

¹⁶ Id.

see rates of COVID-19 infection at least equal to, if not higher, than those in the surrounding communities. These facts, taken together, strongly suggest that the lack of SCDC public data showing any incarcerated people infected with the COVID-19 virus is a result of the omission from the SCDC COVID-19 Action Plan of any protocol for the *testing* of incarcerated people as opposed to merely screening for symptoms or unspecified risk factors.

With your authority as governor, you have issued over a dozen separate executive orders relating to COVID-19,¹⁷ most recently a “stay at home or work” mandate for residents in order to limit the spread of the virus across the state. S.C. Supreme Court Chief Justice Beatty’s order, along with daily COVID-19 guidance from high profile public health experts, stands in sharp contrast to SCDC’s highly dubious COVID-19 Action Plan for addressing the consequences of this pandemic. SCDC’s failure to mitigate the spread of COVID-19 has been compounded by the well-known pre-existing understaffing problem within the state prison system. These factors create a compelling case that the burden has shifted to the SCDC to demonstrate that it is doing enough to protect its employees, incarcerated people, and the public at large.

Urgency of Implementing a Prison Reduction Plan

It is imperative that you immediately implement a prison population reduction plan to address this public health crisis. With each passing day, the potential for additional SCDC employees and incarcerated individuals to become infected grows exponentially, **so we implore you to publicly commit to enacting a prison reduction plan no later than 5:00 pm on Monday, April 13, 2020.**

In crafting this plan, we suggest ordering the following, which research shows will be effective in accomplishing the goal of reducing the state prison population without jeopardizing the safety of the public:

Background:

Correctional facilities are filled with vulnerable populations, including the elderly and those with chronic medical and mental health conditions, who face the highest risk of serious illness or death when infected with COVID-19. Research indicates older people typically “age out of criminal behavior,”¹⁸ meaning recidivism rates decline precipitously with age. Research also indicates very low recidivism rates for those saddled with serious medical conditions.

¹⁷ McMaster, Governor Henry, Executive Orders, from South Carolina Office of the Governor Henry McMaster website, April 9, 2020 at <https://governor.sc.gov/executive-branch/executive-orders>

¹⁸ Goldstein, Dana, *Too Old to Commit Crime?* The Marshall Project, March 20, at <https://www.themarshallproject.org/2015/03/20/too-old-to-commit-crime>

Presumption of immediate release for incarcerated individuals:

- Any incarcerated person whose release would not jeopardize public safety and
- Has serious underlying medical issues (including but not limited to chronic lung disease, moderate to severe asthma, serious heart conditions, immuno-compromised individuals, severe obesity, diabetes, chronic kidney disease, or liver disease), or
- Is age 50 or older, or
- Has serious mental health conditions that are often accompanied with an inability to maintain good hygiene habits, or an inability to take medications as directed,
- Has serious developmental disabilities, or
- Is within six months of their anticipated release date.

With respect to individuals qualifying for immediate release pursuant to these criteria, the presumption will be in favor of release and SCDC shall have the burden of creating a record based on accepted objective criteria as justification for any SCDC determination that the incarcerated person's release poses a credible threat to public safety.

In addition, time is of the essence to reduce the population in our crowded state prisons to adequately comply with CDC guidelines for maintaining "distancing" of at least six feet between individuals.¹⁹ This will require reducing the number of people in open dorms and limiting cells to single occupancy.

To achieve these goals, you should direct the S.C. Board of Probation, Pardon and Parole (PPP) to reconvene to execute parole hearings utilizing online conferencing tools and grant parole to the following categories of incarcerated people on an expedited basis:

- Parole-eligible individuals who have been disciplinary free for the past year
- Individuals in prison solely for technical violations of parole or probation
- Individuals serving indeterminate sentences, based on expanded parameters for medical and geriatric release to address the vulnerability of those incarcerated people to the effects of the COVID-19 virus.

¹⁹ Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *Social Distancing, Quarantine and Isolation*, April 9, 2020 at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html>

As with incarcerated people who qualify for immediate release, the presumption will be in favor of release, with SCDC bearing the burden to show cause why that individual must remain in prison

The time for action is now. This pandemic is here, and it has already made its way into our state's prison facilities. We hope you will recognize the emergency before us, and **publicly commit to enacting a prison reduction plan no later than 5:00 p.m. on Monday, April 13, 2020.**

Sincerely,

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