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June 5, 2020

VIA ELECTRONIC MAIL

Justice Mary C. Noble
Secretary, Kentucky Justice & Public Safety Cabinet
125 Holmes Street
Frankfort, KY 40601
Mary.Noble@ky.gov

Cookie Crews
Commissioner, Kentucky Department of Corrections
275 E. Main St.
Frankfort, KY 40621
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RE: COVID-19 in the Kentucky Department of Corrections Facilities

Dear Secretary Noble and Commissioner Crews:

We write today to ask that the Kentucky Department of Corrections take *immediate action* to protect medically vulnerable people incarcerated in its facilities from the COVID-19 pandemic. Along with the rest of Kentucky, we watched with alarm as the novel coronavirus rapidly spread at Green River Correctional Complex (“GRCC”), infecting hundreds of people despite initial efforts at containment and likely killing three people. We are receiving concerning reports about potential exposure to the pandemic at the Kentucky Correctional Institution for Women (“KCIW”) and Luther Lockett Correctional Complex (“Luther Lockett”), and therefore believe the Department of Corrections must act now to prevent further tragedy and loss of life. To that end, we ask you to:

1. Test everyone currently incarcerated in a Kentucky prison for COVID-19.
2. Release medically vulnerable people¹ incarcerated in Kentucky prisons, or move them to home confinement until

¹ Medically vulnerable people includes all individuals incarcerated in Kentucky prisons over the age of 50, as well as incarcerated people of any age who experience: chronic lung disease or moderate to severe asthma; serious heart conditions; conditions that can cause a person to be immunocompromised, including cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, or prolonged use of corticosteroids and other immune weakening



the availability of a treatment or vaccine neutralizes the threat of COVID-19.

We believe that the Department of Corrections failed to adequately and timely respond to the COVID-19 outbreak at GRCC. The virus appears to have been brought into the facility by staff, who then passed it on to incarcerated people. Prison officials tried to contain the virus by placing people who showed symptoms or may have been exposed to the novel coronavirus in segregation. This strategy did not work—the prison was simply too crowded to allow social distancing. People who had been exposed returned to their small double-bunked cells, and often became symptomatic before getting moved. As a result, the virus quickly spread, the facility’s capacity to isolate symptomatic people in accordance with CDC guidelines² was quickly overwhelmed, and the outbreak spread out of control. People sat sick in their cells, were rarely provided any medical care beyond Tylenol, and the disease continued to rapidly infect incarcerated people and prison staff alike. The prison only regained some semblance of control over the situation after testing everyone in the facility and taking deliberate steps to cohort people according to their exposure status and vulnerability.³

Unfortunately, we now see some of the same warning signs at KCIW and Luther Lockett as GRCC displayed in the opening days of its outbreak. People incarcerated in both facilities live in small, double-bunked cells in close quarters to others. Social distancing strategies have not been implemented in either facility, and large groups of people continue to congregate in common areas such as dining halls, gyms, or the recreation yard. People at Luther Lockett have indicated that—just as at Green River in early April—individuals who feel ill and who have a fever are sent to the segregation unit. Likewise, people at Luther Lockett have seen janitors coming in and out of the segregation unit in full protective equipment. At KCIW, a growing number of staff have become ill, with three positives among

medications; severe obesity (defined as a body mass index of 40 or higher); diabetes; chronic kidney disease or undergoing dialysis; or liver disease.

² *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CDC, 15–17 (Mar. 23, 2019) [hereinafter *CDC Guidance*], <https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf>.

³ Of course, even this control is limited. It took many days before the chaotic shuffle into cohorts was complete, and many people have reported first being placed in a positive dorm before later getting moved to a negative dorm. To our knowledge, additional mass testing has not been conducted at GRCC, and it is difficult to say how many additional people were exposed to the virus as a result of the move.



the staff as of Friday, June 5. Neither facility has implemented widespread testing for the presence of COVID-19, or even widespread screening for symptoms. These warning signs indicate that both facilities are poised to travel down the same dangerous and deadly path as GRCC.

You have a constitutional obligation to protect the incarcerated people in your care from the substantial risk of serious harm posed by COVID-19. Under this Eighth Amendment obligation to provide “humane conditions of confinement,” you must “ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of the inmates.” *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). Furthermore, the Supreme Court has made clear that the Constitution requires proactive measures to prevent the exposure of incarcerated people to substantial harm. *Helling v. McKinney*, 509 U.S. 25, 33–34 (1993).

It is beyond dispute that COVID-19 poses a substantial risk of serious harm to incarcerated people, particularly those with medical vulnerabilities. As of June 5, 2020, the CDC reports that 108,064 people have died as a result of COVID-19.⁴ Facilities with close living quarters—such as cruise ships, nursing homes, and correctional settings—have been particularly deadly. As COVID-19 has swept through prison systems around the country, the number of deaths has climbed steadily upward. As of June 4, 2020, nearly 500 people incarcerated in prisons have died due to COVID-19.⁵ At GRCC alone, at least two, and possibly three, people have tragically perished as a result of the novel coronavirus. Older people and people with underlying medical conditions, such as asthma, lung disease, heart disease, or diabetes have a higher likelihood of developing serious illness or death. As the pandemic continues to rage across the country and around the world, medically vulnerable people incarcerated in Kentucky’s prisons play a deadly waiting game.

There is similarly no doubt that you are aware of this substantial risk of serious harm. The CDC,⁶ the Kentucky Department for

⁴ *Coronavirus Disease 2019 (COVID-19): Cases in the U.S.*, CDC (last updated June 5, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

⁵ *A State-by-State Look at Coronavirus in Prisons*, THE MARSHALL PROJECT (last updated June 4, 2020, 6:00 P.M.), <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>.

⁶ See *CDC Guidance*, *supra* note 2.



Public Health,⁷ and various advocates⁸—including our organization⁹—have all alerted you to the danger. You have weathered one outbreak at GRCC, and you have put in place some limited measures at other facilities.¹⁰ And yet, despite your awareness of this harm, you persist in refusing to conduct mass testing of the incarcerated population, social distancing remains impossible in your facilities, and you have taken few—if any—actions to protect medically vulnerable people from this deadly virus. Federal District Courts in the Sixth Circuit have found similar behavior to constitute deliberate indifference to a substantial risk of harm in violation of the Eighth Amendment to the United States Constitution. *See Cameron v. Bouchard*, No. 20-10949, 2020 U.S. Dist. LEXIS 89083, at *53–66 (E.D. Mich. May 21, 2020); *Wilson v. Williams*, No. 4:20-cv-00794, 2020 U.S. Dist. LEXIS 70674, at *19–21 (N.D. Ohio Apr. 22, 2020).

If you fail to take immediate action to remedy this situation by implementing COVID-19 testing for all incarcerated people in Kentucky prisons and by releasing or placing on home confinement medically vulnerable people, you will be continuing an ongoing constitutional violation that jeopardizes the health and lives of the vulnerable people in your care. If you will not act, we intend to take

⁷ *Novel Coronavirus (COVID-19) Guidance for Correctional Facilities*, KY. DEP'T FOR PUBLIC HEALTH (Mar. 10, 2020), <https://chfs.ky.gov/agencies/dph/covid19/correctionalfacilitiesforcovid19.pdf>.

⁸ Letter from Damon Preston, Public Advocate, Dep't of Public Advocacy and Timothy Arnold, Post Trial Division Director, Dep't of Public Advocacy, to Mary Noble, Secretary, Justice & Public Safety Cabinet, and Leila A. VanHoose, Chair, Ky. Parole Bd. (Mar. 26, 2020), <https://dpa.ky.gov/News-and-Public-Information/Documents/DPA%20COVID-19%20Letter%20to%20Justice%20Cabinet%20and%20Parole%20Board%20%28FINAL%29.pdf>; Coalition Letter from Amanda Hall, Smart Justice Field Organizer, ACLU of Ky., et al. to Gov. Andy Beshear (Mar. 30, 2020), https://www.aclu-ky.org/sites/default/files/wysiwyg/covid19_coalition_letter_to_beshear_with_recs_for_jails_and_prisons.pdf.

⁹ Letter from Amanda Hall, Smart Justice Field Organizer, ACLU of Ky., to Gov. Andy Beshear, et al. (Mar. 30, 2020), https://www.aclu-ky.org/sites/default/files/wysiwyg/aclu-ky_coalition_letter_on_decarceration_and_covid19.pdf.

¹⁰ *Key Initiatives the Kentucky DOC is taking to help fight COVID-19*, KY. DEP'T OF CORR. (last accessed June 5, 2020), <https://corrections.ky.gov/Facilities/Pages/covid19.aspx>.



all appropriate and available actions to safeguard the well-being and civil rights of these Kentuckians.

We look forward to your response no later than Friday, June 12, 2020. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Corey Shapiro". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Corey Shapiro
Legal Director

Cc: Travis Mayo, Chief Deputy General Counsel, Office of the Governor (Travis.Mayo@ky.gov)
Robyn Bender, General Counsel, Kentucky Justice & Public Safety Cabinet (Robyn.Bender@ky.gov)