

June 12, 2020

VIA ELECTRONIC MAIL

Corey Shapiro
Legal Director
ACLU Kentucky
325 W. Main Street
Suite 2210
Louisville, KY 40202

Dear Mr. Shapiro:

I am responding to your letter to Secretary Noble and Commissioner Crews dated June 5, 2020. The Justice and Public Safety Cabinet (“JPSC”) and the Kentucky Department of Corrections (“DOC”) are committed to protecting individuals incarcerated in state prisons from the current pandemic. JPSC and DOC, in consultation with the Department for Public Health (“DPH”), have taken proactive measures to prevent COVID-19 from entering correctional facilities and to mitigate the spread of COVID-19 in Green River Correction Center and any other correctional facility that might have inmates test positive for the virus. JPSC and DOC implemented the Centers for Disease Control and Prevention (“CDC”) Guidelines for Correctional and Detention Facilities early on and are committed to following that guidance as well as that provided by DPH. Over time, JPSC and DOC’s response has evolved as conditions and knowledge about the virus developed and changed. To the extent that conditions and knowledge about the virus continue to develop and change, the response will continue to evolve.

Measures Taken at All DOC Correctional Facilities

I would like to point out the many affirmative steps that JPSC and DOC have taken at all of its correctional facilities including the following:

- Suspending visitation;

- Suspending all outside programming and volunteer activity;
- Suspending transfers between facilities with the exception of operational or medical emergencies;
- Quarantining new inmates received at a facility for 14 days before they are incorporated with the general inmate population;
- Enhancing sanitization efforts using germicide and bleach solution multiple times daily;
- Increasing access to hand sanitizer for staff and soap for inmates, while also educating on the CDC guidance for mitigating the spread of germs;
- Screening staff for COVID-19 symptoms every day upon entry, including temperature scans and questions related to current health symptoms and recent travel (with the same being done for anyone who enters a DOC facility);
- Sanitizing hands and feet of anyone entering a DOC facility;
- Distributing cloth masks to all staff and inmates;
- Implementing social distancing, as much as feasible, including limiting the number of people in the cafeteria or out in exercise areas at one time; and
- Developing quarantine and medical isolation accommodations for symptomatic and exposed individuals across DOC facilities.¹

As an added layer of protection for our staff, the incarcerated population and the community at large, DOC partnered with its medical provider, Wellpath, and implemented drive-through testing for our prison staff.

Green River Correctional Complex

Also, we have taken many steps at Green River Correctional Complex (“GRCC”) in response to COVID-19. Again, as more information and knowledge about the virus has become available, the response at GRCC has evolved. In addition to the measures being taken at all DOC facilities, GRCC has been operating under controlled containment since April 6. With these measures, the facility has, in essence, been locked down by

¹ The DOC medical team in partnership with DPH determines testing needs and next steps for those who exhibit COVID-related symptoms; this includes quarantining, medically isolating, or transferring the individual to a hospital, as needed.

dormitory. The inmates are still allowed time outside their room when they may exercise, make phone calls, and send emails. These outside-the-cell activities are strictly controlled and done in pairs to allow social distancing.

In addition to the increased sanitization at all facilities, at GRCC ten extra bottles of germicide have been placed in each dorm and refillable spray bottles have been provided for each cell. Every dorm entrance is equipped with foot sanitation systems so inmates and staff can kill any germs on their shoes before entering the dorm.

We distributed cloth masks to inmates and staff on April 3 and 4, and then ordered 3,000 extra masks so staff and inmates can have a mask to wear while they launder the other one. In May, we increased this allocation to three masks for every inmate. Masks are mandatory for staff and inmates. In addition to masks, the staff wear gloves, and staff working the housing units for positive inmates wear protective gowns.

We have established regular medical checks for all inmates. Medical staff go to each dormitory and check on the men cell by cell. Medical staff closely monitor medically vulnerable inmates, checking on them regularly throughout the day. If any inmate becomes symptomatic for any illness, not just COVID-19, and the prison medical staff cannot handle their care adequately, they are transferred to the hospital.

For many weeks at the beginning of the pandemic, COVID-19 tests were not widely available, and JPSC and DOC did not have access to tests to conduct mass testing. Nevertheless, on April 24, 2020, the Governor announced testing for all staff and inmates at GRCC. We worked closely with DPH on the large-scale testing, which was completed May 1. Based on the results, the entire inmate population was separated into distinct housing areas: 1) positive inmates, 2) negative inmates with direct exposure, 3) negative inmates with no exposure, and 4) medically vulnerable inmates. Initial retesting has also been completed and inmates and staff are moving to a recovered status. Over 345 inmates at GRCC have recovered from COVID-19. The vast majority of the inmates who tested positive were asymptomatic.

While we believe we have made significant strides in containing the virus at GRCC, we continue to diligently monitor the situation there and will continue to take affirmative measures to protect inmates and corrections staff.

KCIW and Luther Luckett

On May 26, KCIW reported its first positive case: a contract medical employee. Contact tracing was conducted, and there were no additional positive tests for a week. On June 1, a correctional office tested positive and on June 3, a food service employee tested positive. Contact tracing was again undertaken, and all subsequent tests were negative.

KCIW continued to conduct screening on staff and monitored the inmate population daily for any changes in symptoms. On June 10, two dozen inmates in one unit reported some symptoms related to COVID-19. As a result, twenty-six inmates were quarantined and tested. The tests results came back on the evening of June 11: 11 inmates tested positive, 13 negative and 2 test results are still pending. Medical staff will closely monitor all COVID-19 positive inmates. Prison staff are contacting the positive inmates' primary contact to inform them of the test results.

DOC is coordinating with DPH to test all 639 inmates and 228 employees (including contract staff) at KCIW starting today and continuing into next week. The prison's most vulnerable inmates will be tested first. Testing will be carried out one building at a time. If the test results indicate the need, the entire inmate population will be separated into distinct housing areas.

The prison will begin operating under controlled containment today (June 12) in order to accomplish the mass testing. The prison will be locked down by dormitory, while still allowing inmates time outside the cell for individual exercise, phone calls and electronic mail. These outside-the-cell activities will be strictly controlled and done in small groups to allow social distancing

Regarding Luther Lockett Correctional Complex ("Luther Lockett"), it has not had a positive case among its inmate population or staff. Since the outset of the pandemic, we have been using a unit at Luther Lockett that was previously a segregation unit as a medical quarantine area. This unit houses inmates returned from the community and medical- or court-related overnight trips. Upon their return, inmates are quarantined in this unit for 14 days to make sure that they do not bring the virus into the facility. In an abundance of caution, our inmate cleaning team members assigned to this unit are issued full Tyvek suits when cleaning. This is not done as a result of a positive COVID-19 test or a symptomatic inmate, but instead as an added precaution.

Covid-19 Conditional Commutations

With respect to the release of inmates, the Governor has already provided conditional commutations of 538 state inmates (186 state inmates housed in state correctional facilities and 352 state inmates housed in county jails) identified as at higher risk for severe illness or death due to their medical conditions and age per guidelines issued by the CDC.² These inmates were serving sentences for non-violent, non-sexual offenses

² The CDC identifies people 65 years and older as at high-risk for severe illness from COVID-19. <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html> (visited June 10, 2020).

and had 5 years or less to serve on their sentences. In addition, the Governor conditionally commuted another 697 inmates who were non-violent, non-sex offenders who were serving sentences set to expire on or before September 30, 2020. The Governor conditionally commuted the sentences of 1235 offenders in April and as of this date, 1170 have been released.³

With regard to the request to release medically vulnerable inmates or move them to home confinement, there is no mechanism for JPSC or DOC to take any such actions. Unlike the federal system, JPSC and DOC do not have the ability to put people into home incarceration nor is there the same broad compassionate release authority that the federal system has. Under KRS 439.3405, the Parole Board may consider any prisoner for parole when that prisoner has a documented terminal medical condition likely to result in death within one year. The risk of COVID-19 does not meet the criteria for the Parole Board to review compassionate release.

As for home incarceration, KRS 532.260 governs the terms and eligibility for the program. By statute, only the sentencing judge can impose home incarceration as a sentence, and it is limited to non-violent, non-sex offenders eligible to serve their sentences in a county jail (Class D's and some class C's). KRS 532.210(1). *See* KRS 532.100 (limiting jail service to Class C and D felonies). Accordingly, JPSC and DOC cannot take the action that you demand of moving inmates to home confinement.

Wilson v. Williams

As you may know, the Sixth Circuit issued an opinion this week in the *Wilson v. Williams* case cited in your letter and determined that the District Court erred in concluding that the petitioners have shown a likelihood of success on the merits on their Eighth Amendment claim in granting the petitioners' temporary injunction. In that case, the petitioners were seeking release from custody from a federal prison, Elkton, which has a COVID-19 outbreak. The Sixth Circuit determined that the petitioners were unlikely to succeed on the merits of their case because the officials at Elkton responded reasonably to the risks of COVID-19. *See Wilson v. Williams*, No. 20-3447, at 13 (6th Cir. June 9, 2020) ("Prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk even if the harm ultimately was not avoided." (quoting *Farmer v. Brennan*, 511 U.S. 825, 844 (1994))). Similar to the actions taken at Elkton, DOC implemented preventative measures to protect inmates from the risk of COVID-19 at GRCC (and all Kentucky prisons),

³ The total number released differs from the total of the three commutations by 65 because some inmates did not meet the conditions of release as they did not have a verifiable home placement or they received additional sentences; there were also a few individuals who appeared on more than one commutation list because they met the criteria for multiple lists.

including screening for symptoms, educating staff and inmates about COVID-19, cancelling visitation, quarantining new inmates, implementing regular cleaning, providing disinfectant supplies, providing masks and more as detailed above. As knowledge about COVID-19 developed, DOC's actions at GRCC evolved to provide mass testing and segregation of inmates based on their test results and possible exposure.

Other circuits have concluded that similar actions by prison officials demonstrate a reasonable response to the risk posed by COVID-19. *See Swain v. Junior*, 958 F.3d 1081 (11th Cir. 2020) (per curiam); *Valentine v. Collier*, 956 F.3d 797 (5th Cir. 2020) (per curiam); *Marlowe v. LeBlanc*, No. 20-30276, 2020 WL 2043425 (5th Cir. Apr. 27, 2020) (per curiam).

JPSC and DOC have taken affirmative actions to not only treat and quarantine the inmates at GRCC who have tested positive, but also to prevent widespread transmission of COVID-19. Similar steps have been taken at the other institutions. These actions have evolved as new guidance has emerged. *See Williams v. Wilson*, No. 20-3447, at 18. JPSC and DOC's affirmative action in the face of COVID-19 does not constitute deliberate indifference to a substantial risk of harm in violation of the Eighth Amendment.

Conclusion

All COVID-19 testing and preventive steps to mitigate the spread of the virus implemented by DOC have been done in close consultation with DPH. JPSC and DOC are consulting with DPH to determine the possibility of testing every inmate in every state facility. While COVID-19 test kits are more readily available now than they were in March, the ability to conduct and the timing of mass testing on this scale will depend on the availability of test kits.

In close collaboration with the Department for Public Health, JPSC and DOC will continue to take all measures necessary and feasible to mitigate any health risks and contain the spread of the virus in state correctional facilities.

Sincerely,
/s/ Robyn R. Bender
Executive Director, Office of Legal Services
Justice & Public Safety Cabinet