From: Information related to CoVid19 on behalf of Davina Chen
To: FDO_CORONAVIRUSLIST@LISTSERV.FD.ORG
Subject: CARES Act Home Confinement Revocations
Date: Wednesday, August 3, 2022 11:14:52 AM
Attachments: image001.png
image003.png
01 Directions to Access Defending in the Age of COVID19.pdf
AFD letter--add any ADA claims re reasonable accomodations as appropriate.pdf
247-CR Order.pdf
ECF 1 -- Habeas Petition, Request for Enlargement, and Exhibits -- Nicks v Pullen 22cv925.pdf
USA Today Article.pdf

****please forward to all AFDs and CJA counsel*****

Hello champions of liberty!

I am writing with an update on CARES Act home confinement and to re-up the email below regarding advocacy for clients who are being revoked right now.

First the Update: The BOP published a proposed rule in the Federal Register, which affirms that BOP has the authority to permit individuals transferred to CARES Act home confinement to remain on home confinement after the end of the "covered emergency period" (30 days after the declared national emergency is over). It does not explain what procedures or criteria BOP would use to determine who would remain on home confinement and who might be returned to custody. The Federal Public and Community Defenders joined comments to this rule, which praised DOJ for its correct interpretation of the CARES Act, encouraged it to engage in formal rulemaking to set forth the procedures and criteria for retuning folks to prison, and explained that any procedures/criteria should be consistent with BOP's expressed view that permitting folks to remain on home confinement is good policy and must comply with constitutional due process. Other stakeholders also submitted comments, including FAMM and Professor Sarah Russell's powerful comment telling the stories of how poorly BOP has been exercising its unfettered discretion and the critical role lawyers play in preventing this.

You may also have seen the terrifying USA Today article, "They were released from prison because of COVID-19. Their freedom didn't last long," attached to this email in case you hit a paywall, describing the willy-nilly manner in which our clients have been torn from their families.

And it's still happening: I am beginning to hear an uptick of reports of people being remanded for suspect reasons, or no reason at all. I am resending the email below, which includes some ideas for how you can help stop this. **What we have experienced so far is that early attorney involvement is crucial and can, in some cases, prevent clients from being returned to prison---some of them for decades.** So, while the email below sets forth a number of suggestions for what you might do AFTER a client is revoked, I'm really hoping that by showing BOP we are watching them, we can prevent them from being revoked at all. As we set forth in our comments, we believe that our clients have a Fifth Amendment right to a

hearing before a neutral and detached decisionmaker, an opportunity to be heard both on whether they have violated the conditions of their home confinement and why return to prison is not warranted, and in some instances counsel. Maybe you won't get that---but maybe you can also convince BOP not to tear your client away from the community!

From: Davina Chen
Sent: Wednesday, March 9, 2022 11:22 AM
To: FDO_CoronavirusList@listserv.fd.org; 'SRC_NATIONALMAILINGLIST@LISTSERV.FD.ORG' <SRC_NATIONALMAILINGLIST@LISTSERV.FD.ORG>
Cc: Russell, Sarah F. Prof. <Sarah.Russell@quinnipiac.edu>; Marisol Orihuela <marisol.orihuela@ylsclinics.org>
Subject: CARES Act Home Confinement updates, samples, and request for your resources

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Some folks are being sent from CARES Act Home Confinement back to prison for no good reason and with no process at all. You can help!

CARES Act Home Confinement: Thousands were transferred to home confinement pursuant to the CARES Act. Although DOJ's Office of Legal Counsel initially interpreted the statute to require return to prison after the pandemic emergency is over, OLC later reversed itself and opined that folks could remain out at the discretion of the BOP. AG Garland testified before the Senate it would be terrible policy to return people to prison who were doing well on home confinement. We have been and will continue to advocate that BOP promulgate rules that permit our clients to continue thriving in their communities.

Problems: BUT we are hearing that some folks are being sent back for bad, terrible, or no reasons at all.

How you can help: If you are hearing from these clients also, there may be ways to help. In addition to (1) advocating with BOP to prevent revocation, the two litigation tools we are using right now are (2) compassionate release motions (18 USC 3582(c)(1)(a)), and (3) petitions for writs of habeas corpus (28 USC 2241).

(1**) BOP Advocacy**. No doubt, advocating with BOP is sometimes like shadow boxing. But you all are exceptionally persuasive, and this is a place to use those skills of persuasion. Try calling the halfway house that is supervising your client, the RRM (residential reentry management field office), as well as regional counsel. Ask why your client is being revoked, for access to any incident reports and evidence, and to be present at any sort of "hearing." If your client suffers from any mental or physical disability that would make it especially difficult for him to represent himself without your assistance, make sure to mention that. **Put it all in writing** (sample attached). If that doesn't work, at least you have created a paper trail you can use it to litigate if you need to.

(2) **3582(c)(1)(A).** You all know about compassionate release motions. We are aware of at least three cases where such motions were granted because a client was returned to prison from CARES Act Home Confinement for no good reason--including attending a computer class,

communicating via email to folks in prison, needing medical care that apparently Butner was best equipped to provide. All of them received a reduction-in-sentence to time served. Ms. Espejo's order is attached.

(3) **2241.** Here's another tool if a CR motion is not promising. Folks on home confinement have a liberty interest protected by the due process clause. According to the Supreme Court, serving one's custodial sentence at home is akin to probation and parole, and thus one cannot be returned to prison without notice, opportunity to be heard, detached and neutral decision maker, and in some circumstances, counsel. AND, if they are sent back to prison in violation of these, and other, rights, they may have recourse through a habeas petition.

It could work! AFD Martin Cohen, with support from Professors (and former AFPDs) Sarah Russell and Marisol Orihuela filed a 2241 after their client was returned to prison for an alleged positive for marijuana. The petition resulted in an Order a few hours later ordering that BOP return their client home (and to her 10-month old baby) forthwith.

No doubt, this is brand new terrain for most of us. But so was compassionate release two years ago! Please reach out if you have a client in threat of remand. I am attaching a sample petition filed in D. Conn., and Professors Russell and Orihuela (cc'ed on this email) have generously agreed to serve as resources as we navigate this new terrain. Perhaps if we do it enough, BOP will tell their folks to stop torturing out clients.

The "Box"*: Yes, there is a "box" for this. We are collecting resources, including BOP contact information, sample pleadings, etc., inside the "Defending in the Age of COVID-19" box, here:

> Defending in the Age of COVID19\501 Home Confinement and Furlough\06 HC and CCC Revocations

But these resources are only as good as you make them, so please share your materials as you create them.
*If you don't have access to this box, I've attached directions for requesting access.

Your Stories: Finally, as we advocate for fair BOP rules and policies, your stories are invaluable. Please let us know what's going on! Of course, we will not use your clients' stories in our advocacy without your permission.

Davina T. Chen
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SRC sentencing resource counsel

Federal Defender and CJA attorneys: For sentencing-related questions, you can sign up for zoom office

hours (first and third Thursdays of each month) by using this link.

From: Information related to CoVid19 <FDO_CORONAVIRUSLIST@LISTSERV.FD.ORG> **On Behalf Of** Patricia Richman
Sent: Tuesday, December 21, 2021 1:24 PM
To: FDO_CORONAVIRUSLIST@LISTSERV.FD.ORG
Subject: OLC Home Confinement Memo: Reversed!

All-

I write with very happy news. Today, the Department of Justice Office of Legal Counsel issued a memo rescinding their prior opinion that BOP would be required to recall all individuals placed on CARES Act home confinement when the COVID-19 emergency ends.

We have not carefully parsed the 15-page memo, and will send more careful analysis later, but here is the executive summary:

"Having been asked to reconsider, we now conclude that section 12003(b)(2) and the Bureau's preexisting authorities are better read to give the Bureau discretion to permit prisoners in extended home confinement to remain there."

Yippee!

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