



Attorney General Merrick Garland
Office of the Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

July 20, 2022

Re: Comment on Home Confinement Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act

Attorney General Garland:

On behalf of The Sentencing Project, I am writing to offer comments on the United States Department of Justice's proposed rule on CARES Act Home Confinement. We value this rule's assertion that Section 12003(b)(2) of the CARES Act allows individuals placed in home confinement under the CARES Act who would not otherwise be eligible for home confinement to remain there after the covered emergency period ends. We are concerned, however, that the rule's absence of clear and evidence-based guidance regarding the Bureau's "individualized assessments" as to whether such individuals should remain in home confinement following the termination of the covered emergency period will result in unnecessary and unjust reincarceration.

We encourage the Department to expand upon this rule and clarify the standards that will be used during that individualized assessment. Specifically, we urge the Department to adopt a presumption that individuals placed in home confinement should remain in home confinement, absent a showing that they have engaged in a significant violation of their conditions of release. In making that determination, we urge the Department to ensure that individuals receive due process, including the opportunity to contest the allegations that they have violated their conditions of release at a hearing before a neutral decision maker with the assistance of counsel and the ability to confront witnesses and present evidence. Below, we outline these critical recommendations and the reasons for them in greater detail.

1. Individuals should remain in home confinement absent a significant violation of their conditions of release.

When making individualized determinations about whether individuals placed in home confinement under the CARES Act will remain in home confinement after the expiration of the covered emergency period, the Department should adopt a presumption that absent a significant violation of their conditions of release, individuals should remain in home confinement. Given

the extraordinarily low recidivism rate of individuals placed in home confinement, the high and increasing number of individuals currently in BOP custody,¹ and the significant costs associated with incarcerating elderly and medically vulnerable individuals² it is in the interest of justice, public safety, and fiscal responsibility to minimize the reincarceration of individuals on home confinement.

Specifically, we urge the Department to clarify that individuals should not be returned to prison for mere technical violations. Limiting the use of incarceration for technical violations is an evidence-based practice and increasingly common reform within the context of probation and parole.³ The Department should draw upon this wealth of evidence regarding technical violation policies when developing standards for the revocation of home confinement. Absent such guidance, the potential for individuals to be returned to prison even when their reincarceration is contrary to the interest of justice and public safety is apparent. For example, in 2021, Gwendolyn Levi, a 76-year old grandmother in remission from lung cancer, was returned to prison after failing to answer her phone during a computer class that she believed she was authorized to attend.⁴ The Department's rule should make clear that such an outcome is inappropriate and work to prevent similar abuses of discretion in the future.

2. Individuals should receive due process and the opportunity to contest any revocation of home confinement.

When individuals return to the community on home confinement, they can return to loved ones, dependent children, education, and employment. For example, during her year in home confinement, Nordia Tompkins was able to regain custody of her daughter, enroll in vocational classes, and maintain stable employment. On her two-hour trip home from the Bronx Community Reentry Center where she reported twice monthly for supervision, Ms. Tompkins stopped by a cell phone store to try to get her phone fixed—which she told RRC staff she was going to do and as believed was required by the conditions of her supervision. The next day she was ordered to return to the Reentry Center and detained on the grounds that she had violated the conditions of her release by visiting the cell phone store. She was sent back to prison without a hearing or any written notice of the basis for her revocation, despite serving as the sole caretaker for her 17 year old daughter.⁵

Given the significant liberty interests at stake, individuals should have the ability to contest the allegations that they have violated their conditions of release at a hearing before a neutral

¹ Federal Bureau of Prisons (2022), Population Statistics, https://www.bop.gov/about/statistics/population_statistics.jsp#old_pops.

² A. Nellis (2022), Nothing But Time: Elderly Americans Serving Life Without Parole, The Sentencing Project, <https://www.sentencingproject.org/publications/nothing-but-time-elderly-americans-serving-life-without-parole/>.

³ Pew Trusts (2019), To Safely Cut Incarceration, States Rethink Responses to Supervision Violations, <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/07/to-safely-cut-incarceration-states-rethink-responses-to-supervision-violations>.

⁴ K. Phillips (2021), 'Scared and confused': Elderly inmate sent home during COVID is back in prison after going to computer class, USA Today, <https://www.usatoday.com/story/news/politics/2021/06/29/covid-19-gwen-levi-back-prison-after-year-home-confinement/7795965002/?gnt-cfr=1>.

⁵ Tompkin v. Pullen (2022), Petition for Writ of Habeas Corpus, <https://lisa-legalinfo.com/wp-content/uploads/2022/05/tompkinscomplaint220510.pdf>.

decision maker with the assistance of counsel and the ability to confront witnesses and present evidence. Furthermore, providing individuals with a meaningful and fair opportunity to contest allegations that they have violated the conditions of their home confinement is vital for preventing miscarriages of justice. Finally, avoiding needless reincarceration is in the interest of public safety. Strong family ties, employment, and education are all activities proven to reduce recidivism.⁶ Unnecessary reincarceration threatens these vital rehabilitative activities, undermining the purpose of home confinement and the mission of the Bureau of Prisons.

Home confinement is a critical alternative to incarceration with the power to reunify families, strengthen reentry, and improve public safety. We urge the Department to adopt a standard and process for revoking home confinement that reflects home confinement's value and importance to individuals, families, and the community. Thank you for this opportunity to provide feedback. For more information, please do not hesitate to contact Liz Komar, Sentencing Reform Counsel, at lkomar@sentencingproject.org.

Sincerely,



Amy Fettig
Executive Director
The Sentencing Project

⁶ J. Butts and V. Schiraldi (2018), Recidivism Reconsidered: Preserving the Community Justice Mission of Community Corrections, Executive Session on Community Corrections, https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/recidivism_reconsidered.pdf.