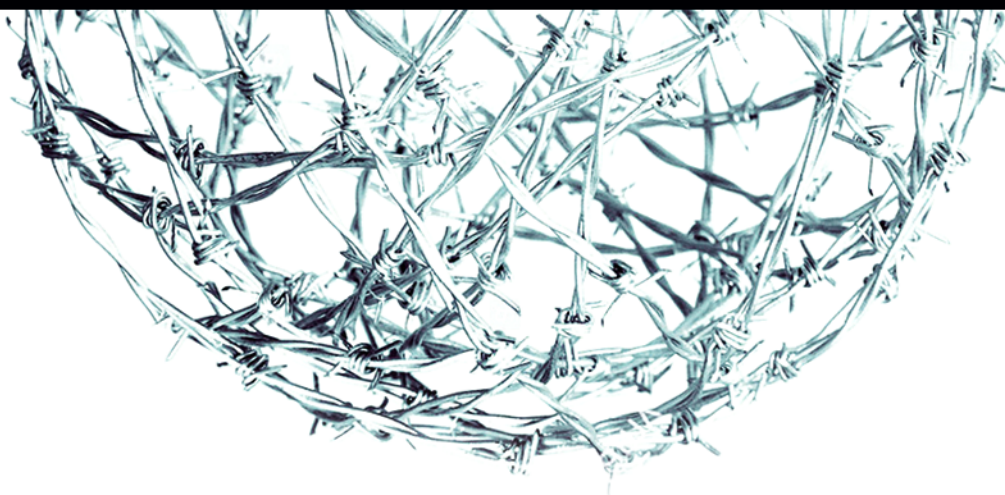



# PANDEMIC IN PA'S PRISONS



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“It has long been said that a society’s worth can be judged by taking stock of its prisons. That is all the truer in this pandemic, where inmates everywhere have been rendered vulnerable and often powerless to protect themselves from harm. May we hope that our country’s facilities serve as models rather than cautionary tales.”

- U.S. Supreme Court Justice Sonia Sotomayor<sup>1</sup>



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## I. Introduction

*“Prisons are tinderboxes for infectious disease,”* concluded a federal judge in Pennsylvania in her order releasing Jeremy Rodriguez, whose poor health made him especially susceptible to COVID-19.<sup>2</sup> This ruling turned out to be prophetic as COVID-19 has ravaged prisons and jails across the United States. Along with nursing homes and meatpacking factories, the largest outbreaks of the virus have occurred in prisons.<sup>3</sup> In Ohio, a state with roughly the same prison population as Pennsylvania, more than 20% of all coronavirus cases in the entire state are within the state prison system.<sup>4</sup> In one Ohio state prison, 73% of all incarcerated individuals tested positive for the virus.<sup>5</sup> At a correctional facility in Indiana, 92% of those tested had contracted the virus.<sup>6</sup> In federal prisons, 70% of those tested for COVID-19 have tested positive for the virus.<sup>7</sup> Mass testing in correctional facilities in Montgomery County, Pennsylvania uncovered 30 times the number of positive cases initially thought to be present<sup>8</sup>

In light of these numbers, alarm bells should be sounding for lawmakers in Pennsylvania. The spread of the virus in Pennsylvania’s prisons and jails is particularly likely and dangerous due to a confluence of factors documented in this report. The Centers for Disease Control and Prevention (CDC) recommends that people stay at least six feet away from one another, regularly clean and disinfect surfaces, and wear masks in order to slow the spread of the virus.<sup>9</sup> As explained in detail below, implementing these measures is practically impossible within Pennsylvania’s correctional facilities. Furthermore, because Pennsylvania imprisons a significant number of at-risk individuals, these measures alone are likely not enough to prevent Pennsylvania prisons from turning into massive breeding grounds for COVID-19. If an extensive outbreak occurs in Pennsylvania’s prisons when the second wave of the virus hits, the existing medical services in these facilities will be overwhelmed with all of those who become sick, and these individuals will be transferred to other hospitals in the community that are already at their capacity.

If more significant lifesaving measures are not taken soon, the toll of COVID-19 in Pennsylvania’s prisons could be catastrophic. In order to protect both our incarcerated and non-incarcerated communities, we urge Governor Wolf to release those most vulnerable to the virus, most of whom do not present any risk to public safety, so that prisons can better abide by the CDC’s health guidelines.

## II. Risk Factors for PA's Prisons and Jails

Incarcerated individuals across the United States are at increased risk of contracting COVID-19, but those within Pennsylvania's correctional facilities face a particularly elevated risk due to a set of factors documented in this report. Specifically, the danger of the virus behind bars in Pennsylvania is exacerbated by the following: 1) overcrowding and close living quarters; 2) inability of those inside to properly clean and disinfect; 3) high numbers of elderly, immunocompromised, and other at-risk individuals; and 4) inadequate medical services and equipment.

First, those in Pennsylvania's correctional facilities cannot adequately practice social distancing due to the overcrowding of Pennsylvania's prisons. Correctional facilities create an increased infection risk because individuals are unable to maintain enough distance from other individuals who may already be infected.<sup>10</sup> The infrastructure within Pennsylvania correctional facilities will be the additional spark that drives COVID-19's rapid transmission inside prison walls. Even before the current crisis, correctional officers warned that overcrowding and close quarters in PA's correctional facilities were "a recipe for disaster."<sup>11</sup> As a federal judge observed when releasing detainees from these facilities, some county prisons have dormitory style units with bunk beds less than two feet apart.<sup>12</sup> Living within such tight-knit quarters, there is no way that Pennsylvania prisoners can maintain the social distancing measures recommended by the CDC. In addition, as an individual incarcerated at SCI Huntington warned, "there is no ventilation on the blocks. That problem is only amplified by a situation like this. With no ventilation, our air just stays stagnant causing a virus just to linger in the air." He added, "the cells here are completely open in the front, making it impossible to stop something from coming in."

Additionally, Pennsylvania's prisoners are unable to practice proper hygiene and properly disinfect their spaces. As shared by one incarcerated individual:

*We do what we have to do as inmates to protect ourselves. Even when we don't have enough cleaning supplies, we will clean the walls with soap, or do what we can. But we can only do so much when supplies are limited. We have to argue with them to get*

*"Imagine being locked in a cage for 23 hours and 20 minutes a day, in close quarters with people who may have the virus. You don't know how many are infected. You do know that if you get infected yourself, you will not receive quality medical care. All of your meals and medication are delivered to you through a 5" x 14" slot in the door, much like a zookeeper delivers meals to a caged animal. You wonder if the people who are handing out life sustaining sustenance are also transmitting death. You're allowed out of the cage for 40 minutes per day, with 6 other incarcerated people, to use the bathroom without your roommate in the cage, phone, kiosk and shower. You're confused from the lack of communication. Anxious from boredom and the unknown. In fear of what is to come. Stressed from worrying about your loved ones. You can't go anywhere. You can feel the avalanche is coming, and you hope to somehow survive the oncoming storm, but you can't get out of the way."*

**-Brett**

*a bar of soap sometimes. Our pod will take a soap bar and split it in half for two people so we can make it last in case they won't give us more.*<sup>13</sup>

Many prisoners report that they are unable to keep hand sanitizer, which is considered contraband due to its alcohol content, and that they have not been provided with an appropriate number of masks.<sup>14</sup> One individual shared, “*At first the masks were new. Now, when they're replaced, they are flimsy and the stitching comes loose like they are used.*” Another man imprisoned at SCI Phoenix expressed anxiety over his current conditions: “*Am I really safe? The staff have hand sanitizer, but we're being told, because of the alcohol content, we can't obtain some.*”<sup>15</sup>

Third, given the large immunocompromised and elderly demographic of Pennsylvania's prison population, those in Pennsylvania's correctional facilities face an increased risk of severe illness, and even death, from the virus. The CDC has stated that both older adults and those with serious underlying medical conditions face a higher risk of contracting a severe form of COVID-19.<sup>16</sup> Pennsylvania's incarcerated population is overwhelmed with individuals in each of these categories.

As of December 31, 2019, Pennsylvania's Department of Corrections (PA DOC) counted 10,697 inmates over the age of 50—a number that represents 23.3% of the total inmate population.<sup>17</sup> This high number is likely due to Pennsylvania's widespread use of mandatory sentences of life without parole (LWOP), which means that individuals with this sentence have no possibility of release even in their old age. Indeed, one in 10 individuals serving an LWOP sentence in this country are incarcerated in Pennsylvania, with the state holding more individuals on LWOP than any other state except Florida.<sup>18</sup>

Because of their underlying health conditions, the incarcerated elderly are more vulnerable to the virus than those of the same age on the outside. Research shows that this population tends to age more quickly than those on the outside and thus suffer health problems more often seen in individuals who are much older.<sup>19</sup> For instance, seniors in prison often suffer from health conditions like hypertension, diabetes, limited mobility, and mental health issues at higher rates than their peers on the outside.<sup>20</sup> One elderly man imprisoned at SCI Phoenix shared his concern for this

#### *April 10 - SCI Coal Township*

*“I have a disease known as sarcoidosis, an autoimmune disease, which attacks my lungs with unforgiving tenacity. I use inhalers to assist with my breathing. In June, I will turn 57, and already I have spent over half of my life in prison. It is very difficult to grow old in prison, but this situation has created more anxiety than I ever imagined. Prisons are not designed for social distancing.”*

**-David Lee quoted in Lockdown Diaries, see note 15.**

demographic of people: *“Because of the draconian sentences handed out in our great State, there are many old people locked behind bars. There are men with canes, walkers, wheel-chairs and bedridden. There are the deaf, the blind, [and] the mentally ill. . . [T]he basic level of healthcare here is not great and I’m fearful what may happen to the most vulnerable among us should the virus show up.”*

Fourth, concerning reports about healthcare failures within prison walls further raise alarm that Pennsylvania prisons will likely not be able to cope if the substantial outbreaks that have occurred in other states were to happen here. For example, one prisoner was sent to the hospital with a fever and then placed directly back into the general population at the prison without being tested.<sup>21</sup> Another person shared that, *“At no point in time have we been given direct information about positive or negative test results of staff or other inmates we may have been in contact with. And the only temperatures taken after that first day were in the section where people had high temperatures: everyone on [my] bloc doesn’t get routine temperature checks. My own temperature has only been taken one time.”*

Instead of treating this pandemic like a public health crisis, the PA DOC is handling it like a public safety crisis, using custody and control measures instead of health and safety measures. Specifically, the DOC has ordered a statewide lockdown of all its prisons, mandating that incarcerated human beings are only allowed an hour at most outside of their cells.<sup>22</sup> Already, this lockdown, which continues to date, is the longest statewide prison lockdown in the state’s history.<sup>23</sup> The rising infections and death toll in Pennsylvania’s jails and prisons show that the DOC’s lockdown approach is not promoting or protecting the health of the human beings in their confines. Very little consideration seems to have been given to the effect this lockdown would have on the overall mental health and wellbeing of the imprisoned population.

Reports from the inside are beginning to emerge about the huge cost to mental health. One woman explained, *“Prison is bad all the time, but the smaller the box you’re forced into, the worse it gets. It’s like being locked in a bathroom for weeks.”*<sup>24</sup> Another man reported, *“It is a very sad and*

*“From the beginning, none of us had the virus. All of our visits were stopped, and guests and volunteers were prohibited, long before our first case. With the design of the place, the only way to have stopped the virus from spreading would have been to eliminate any contact between staff and inmates. Putting us into lockdown only increased our interaction with staff, thus increasing our chances of exposure. This made an officer have to come to the cell a minimum of 3 times per meal. That’s a minimum of 9 extra times per day. That doesn’t even count when they go to pass out mail, commissary, toilet paper, etc. This is not like newer prisons where an officer can let you out of your cell just by hitting a button while inside a control center. Here someone has to come to your cell and use a key to open the cell.”*

*– Adrian*

*depressing mood here. All we do is sleep. It is depressing... But we are in here and there is no movement.*” The same individual lamented that he has not been able to see his psychologist: *“I am a mental health patient. I have yet to be seen by a specialist to even talk about my state of mind. We’re just getting medicated. We are in a pandemic where we need to talk and express how we feel. The last time I saw a psychiatrist was on December 31st and it was for 20 minutes.”* The lockdown has, in effect, been a punishment, tantamount to solitary confinement, which has been condemned as torture for its disastrous mental health consequences.<sup>25</sup>

### III. The Need to Expand Governor Wolf’s Reprieve Program

Governor Wolf has taken some initial steps in the right direction; however, many of those most vulnerable to the virus remain behind prison walls and are trapped with a virus that, for them, is deadly. On April 10, 2020, Governor Wolf issued an executive order directing the PA DOC to establish a Reprieve of Sentence of Incarceration Program.<sup>26</sup> The program was meant to pave the way for release of up to 1,800 individuals, but, as of May 12, 2020, only 146 people had been granted reprieve.<sup>27</sup>

One of the shortcomings of the program is its very limited reach. Through the program, reprieve is only available to two categories of individuals: 1) those who are at high risk of complications from the virus and eligible for release within the next year and 2) anyone who is within nine months of being eligible for release.<sup>28</sup>

Although the Governor intended that the program safeguard those who were particularly vulnerable to COVID-19 due to their age, his order excluded a large class of individuals in this category: those subject to life sentences without the possibility of parole (LWOP). Indeed, the PA DOC considers 46.1% of those serving LWOP sentences to be elderly.<sup>29</sup> They make up approximately a quarter of all elderly people currently incarcerated in Pennsylvania.<sup>30</sup>

Incarcerating these individuals poses more of a risk to public health than releasing them does to public safety. Criminality declines with age and the elderly tend to “age out” of crime.<sup>31</sup> Even the PA DOC acknowledges that most of Pennsylvania’s elderly prisoners are “incapacitated and not a security threat.”<sup>32</sup> Yet, as experts have underscored, the risk to public health is high. On April 7, 2020, Philadelphia FIGHT and other healthcare advocates warned that social distancing is not possible in correctional settings, writing, “[b]ecause of the close quarters in which incarcerated people live, prisons and jails are highly susceptible to outbreaks of cold, flu, MRSA, and other staph infections, as well as transmission of viral infectious diseases like hepatitis.”<sup>33</sup> Concerned that one in ten incarcerated people in Pennsylvania is elderly and that prisons are often located in rural



areas with small healthcare infrastructures, they concluded that *“these factors add up to looming disaster.”*<sup>34</sup> Professor Joseph Amon, the Director of Drexel University’s Office of Global Health, drew comparisons to other close settings, stating *“[w]e’ve responded aggressively to stop cruise ships from running and college dorms from having students, but for jails and prisons we’ve thrown up our hands and said there’s not much we can do.”*<sup>35</sup> The solution, according to Dr. Amon, is *“to look at antibody testing and [release] detainees who don’t need to be incarcerated.”*<sup>36</sup>

The proliferation of COVID-19 cases within the walls of correctional facilities across the United States inevitably will serve as a continuing source of the spread of COVID-19 to correctional officers, employees, and the community at large. As stated by the president of the National Commission on Correctional Health Care during the H1N1 pandemic, *“Jails and prisons are part of communities... If they think that disease won’t spread from there – when you have visitors, workers and delivery people there every day – they’re mistaken.”*<sup>37</sup> The continuing spread of the virus is not the only risk to the public. It is very likely that infected individuals from correctional facilities will overwhelm hospitals across the state, especially those in rural areas, which are already struggling, and this in turn will result in poorer health care for both incarcerated individuals and the community at large.<sup>38</sup> If there is significant increase in COVID-19 cases amongst incarcerated individuals, it will require mass transfers to local hospitals for intensive medical care.<sup>39</sup> Each admitted individual will occupy an ICU bed and some will need ventilator care, which are likely to be in short supply.<sup>40</sup> In order to protect not only our incarcerated population, but also our older and vulnerable population outside prison walls, it is necessary to take steps to slow the spread within correctional facilities.

#### **IV. Governor Wolf’s Authority to Release the Vulnerable**

Pennsylvania law grants Governor Wolf the power to release the vulnerable and elderly in the state’s prisons. Under 35 Pa. Cons. Stat. § 7301(a), the Pennsylvania Governor “is responsible for meeting the dangers to this Commonwealth and people presented by disasters.” To respond to a disaster, the Governor has the power to issue an executive order that has the same force and effect of other laws. § 7301(b). Among other powers, the Governor can:

- (1) Suspend the provisions of any regulatory statute prescribing procedures for conduct of Commonwealth business, or the orders, rules or regulations of any Commonwealth agency, if strict compliance with the provisions of any statute, order, rule or regulation would in any way prevent, hinder or delay necessary action in coping with the emergency;
- (5) Direct and compel the evacuation of all or part of the population from any

stricken or threatened area within this Commonwealth if this action is necessary for the preservation of life or other disaster mitigation, response or recovery; and

(7) Control ingress and egress to and from a disaster area, the movement of persons within the area and the occupancy of premises therein.

§ 7301(f)(1), (5), & (7). (emphasis added).

Four Justices of the Pennsylvania Supreme Court concluded that this statute grants the Governor “the primary authority to release qualifying prisoners on account of a disaster emergency.”<sup>41</sup> The Governor already invoked his authority under 35 Pa. C.S. § 7301(f)(5) and (7), when creating the Reprieve of Sentence of Incarceration Program.<sup>42</sup> In that order, the Governor also acknowledged that “pursuant to Article IV, Section 9 of the Constitution of the Commonwealth of Pennsylvania, Pa. Const. Art. IV, § 9(a), [he is] specifically authorized to grant reprieves in all criminal cases except impeachment.”<sup>43</sup>

## V. Best Practices in Other States

Since the outbreak of COVID-19, numerous states have taken emergency measures to release those most vulnerable to the virus.<sup>44</sup> The routes taken by the Governors of Illinois and Colorado to release those most vulnerable to COVID-19, who do not pose a risk of public safety, provide an example of what should be done in this state. These Governors invoked their emergency powers, which are nearly identical to those entrusted to Governor Wolf by Pennsylvania’s laws.

For example, noting that due to the “close proximity and contact with each other in housing units and dining halls, [incarcerated individuals] are especially vulnerable to contracting and spreading COVID-19,” Governor Pritzker of Illinois issued an order suspending some of the existing statutory restrictions on furloughs.<sup>45</sup> In doing so, he expanded the authority of the Director of the Illinois Department of Correction (IDOC) to use “medical furloughs to allow medically vulnerable [individuals] to temporarily leave IDOC facilities.” at his discretion.<sup>46</sup>

Similarly, recognizing that COVID-19 “poses a significant threat to prisoners and staff who work in facilities and prisons, as well as the communities to which incarcerated persons will return,” Colorado Governor Jared Polis issued an executive order suspending the criteria for Special Needs Parole and temporarily granting discretion to the Colorado DOC to identify new criteria for those who should be parole eligible.<sup>47</sup> The Executive Director of the Colorado DOC determined that individuals could be paroled if they: 1) have a high risk of mortality from COVID-19; 2) present a low risk to public safety; and 3) will have access

to adequate care in the community.<sup>48</sup> Like these Governors of other states, Governor Wolf has the ability to take action.

## **VI. Recommendations to Governor Wolf**

We urge Governor Wolf to expand his current reprieve program to include all of those who are vulnerable to the virus because of their age or medical condition and pose a low risk to public safety. Like the Governors of Colorado and Illinois, Governor Wolf should work with the PA DOC to identify those most vulnerable to the virus and to fast track their release. Specifically, using his emergency powers under 35 Pa.C.S. § 7301(f) to direct and compel evacuation of all or part of a disaster area to preserve life and mitigate further disaster, he should direct the PA DOC to identify all of those currently incarcerated who are vulnerable to the virus and do not pose a risk to public safety and recommend them for reprieve.

If these steps are not taken, it is very likely that Pennsylvania's correctional facilities, their surrounding communities, and the state as a whole will continue to face an 'uncontrolled, unflattened curve,' regardless of the steps that prisons and jails have taken to stave off COVID-19.<sup>49</sup> We conclude this report with an important word of caution from an individual incarcerated at SCI Huntingdon: *"There is another wave of this virus coming. Things could have been much worse here and we may not be so lucky in the future."*

## Endnotes

- <sup>1</sup> *Valentine v. Collier*, 140 S.Ct. 1598 (2020) (statement of Justice Sotomayor, joined by Justice Ginsburg)
- <sup>2</sup> *U.S. v. Rodriguez*, No. 2:03-CR-00271-AB-1, 2020 WL 1627331, at \*2 (E.D. Pa. Apr. 1, 2020), available at <https://www.akingump.com/a/web/4BRU2YvbDSz9jW4p6FUUDf/rodriguez-memorandum.pdf>.
- <sup>3</sup> See Sarah Almukhtar et al., Coronavirus in the U.S.: Latest Map and Case Count, NY TIMES, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last visited May 11, 2020).
- <sup>4</sup> *State-by-State Data: Comparison of Pennsylvania and Ohio Prison Populations Over Time*, SENTENCING PROJECT, <https://www.sentencingproject.org/the-facts/#detail?state1Option=Pennsylvania&state2Option=Ohio> (last visited May 11, 2020). In 2017, Ohio had 51,478 prisoners in state prison and Pennsylvania had 48,074. *Id.*
- <sup>5</sup> Bill Chappell, *70% of Inmates at an Ohio Prison Test Positive for Coronavirus*, NPR (Apr. 20, 2020, 3:58 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/20/838943211/73-of-inmates-at-an-ohio-prison-test-positive-for-coronavirus>.
- <sup>6</sup> Aris Folley, *92 Percent of Inmates Tested for COVID-19 at Indiana Prison Receive Positive Results*, THE HILL (Apr. 23, 2020, 12:48 PM), <https://thehill.com/homenews/state-watch/494322-92-percent-of-inmates-tested-for-covid-19-at-indiana-prison-receive>.
- <sup>7</sup> Michael Balsamo, *Over 70% of Tested Inmates in Federal Prisons Have COVID-19*, AP (Apr. 29, 2020) <https://apnews.com/fb43e3ebc447355a4f71e3563dbdca4f>.
- <sup>8</sup> Jeremy Roebuck & Allison Steele, *Montgomery County's Jail Tested Every Inmate for COVID-19 - and Found 30 Times More Cases Than Previously Known*, PHILA. INQUIRER (Apr. 28, 2020), <https://www.inquirer.com/news/coronavirus-testing-montgomery-county-jail-asymptomatic-philadelphia-prisons-20200428.html>.
- <sup>9</sup> *Coronavirus Disease 2019: Protect Yourself*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last visited May 11, 2020).
- <sup>10</sup> *Compare Cruise Ship Passengers*, U.S. DEPT STATE – BUREAU CONSULAR AFF., <https://travel.state.gov/content/travel/en/international-travel/before-you-go/travelers-with-special-considerations/cruise-ship-passengers.html?fbclid=IwAR23mRlu4-382HLuSM8i0KWQBSaZ4heDniggmxR3kBR6e2E-gWiKr6BOEseM> (last visited: May 11, 2020) (explaining that cruise ship environments increase the risk of infection of COVID-19), with Maria Morris, *Are Our Prisons and Jails Ready for COVID-19?*, ACLU (March 6, 2020), <https://www.aclu.org/news/prisoners-rights/are-our-prisons-and-jails-ready-for-covid-19/> (explaining that “[o]nce a contagious illness enters, conditions in correctional facilities are highly conducive to it spreading”).
- <sup>11</sup> Wallace McKelvey, *Is Pennsylvania Creating a ‘Recipe for Disaster’? Prison Closings Revive Overcrowding Question*, PENN LIVE (Jan. 5, 2019), [https://www.pennlive.com/news/2017/01/prison\\_closings\\_will\\_have\\_far-.html](https://www.pennlive.com/news/2017/01/prison_closings_will_have_far-.html).
- <sup>12</sup> *Thakker v. Doll*, 2020 WL 1671563 at \*5-6 (M.D. Pa. Mar. 31, 2020).
- <sup>13</sup> All stories documented in this report are on file with the Stern Community Lawyering Clinic. All names have been changed to protect the reporters from retaliation.
- <sup>14</sup> See WCED News, *Concerns About COVID-19 Precautions in Pennsylvania Prisons*, CONNECT FM (Apr. 3, 2020), <https://www.connectradio.fm/2020/04/03/concerns-about-covid-19-precautions-in-pennsylvania-prisons/>.
- <sup>15</sup> Samantha Melamed, *Lockdown Diaries*, PHILA. INQUIRER, <https://www.inquirer.com/health/coronavirus/a/prison-pennsylvania-coronavirus-lockdown-doc-sci-phoenix-20200506.html> (last updated May 6, 2020) [hereinafter *Lockdown Diaries*].

<sup>16</sup> *Coronavirus Disease 2019: People Who Are at Higher Risk*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html> (last visited May 11, 2020).

<sup>17</sup> SECRETARY JOHN E. WETZEL, PA. DEPT OF CORR., BUDGET TESTIMONY, FY 2020-21 BUDGET TESTIMONY 12 (2020), <https://www.cor.pa.gov/About%20Us/Statistics/Documents/Budget%20Documents/Budget%20Testimony%202020-21.pdf> [hereinafter WETZEL, FY 2020-21 BUDGET TESTIMONY].

<sup>18</sup> Joshua Vaughn, *What Does Death by Incarceration Look Like in Pennsylvania? These Elderly, Disabled Men Housed in a State Prison*, APPEAL (Nov. 20, 2019), <https://theappeal.org/death-by-incarceration-pennsylvania-photo-essay/>.

<sup>19</sup> See Weihua Li & Nicole Lewis, *This Chart Shows Why the Prison Population is So Vulnerable to COVID-19*, MARSHALL PROJECT (Mar. 19, 2020), <https://www.themarshallproject.org/2020/03/19/this-chart-shows-why-the-prison-population-is-so-vulnerable-to-covid-19>.

<sup>20</sup> *See id.*

<sup>21</sup> See WCED News, *supra* note 14.

<sup>22</sup> See Lockdown Diaries, *supra* note 15. <sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325 (2006). *See also*, *Solitary confinement should be banned in most cases, UN expert says*, UN NEWS, Oct. 18, 2011, <https://news.un.org/en/story/2011/10/392012-solitary-confinement-should-be-banned-most-cases-un-expert-says>.

<sup>26</sup> GOVERNOR TOM WOLF, ORDER OF THE GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA REGARDING INDIVIDUALS INCARCERATED IN STATE CORRECTIONAL INSTITUTIONS, April 10, 2020, available at <https://www.governor.pa.gov/wp-content/uploads/2020/04/20200410-GOV-DOC-reprieve-release-order-COVID-19.pdf>. [hereinafter WOLF, REPRIEVE ORDER] As a matter of law, a “reprieve” postpones the execution of a sentence. *Morganelli v. Casey*, 646 A.2d 744 (1994).

<sup>27</sup> *A Survey of Executive Action Concerning the Spread of COVID-19 in State Correctional Facilities*, NYU LAW – CENTER ON THE ADMINISTRATION OF CRIMINAL LAW, <https://docs.google.com/document/d/1ZOs8LtiPajxjAiKDn4VwDnhng0AkDrMi/edit> (last visited June 5, 2020) [hereinafter NYU Executive Action Report]. For the most up to date information, see the Pennsylvania Department of Corrections website, at <https://www.cor.pa.gov/Pages/COVID-19.aspx>.

<sup>28</sup> WOLF, REPRIEVE ORDER, *supra* note 26 (“Vulnerable inmates shall include inmates at risk based upon age, anyone with autoimmune disorders, who is pregnant, or who has serious chronic medical conditions like heart disease, diabetes, chronic respiratory disease, bone marrow or organ transplantation, severe obesity, kidney disease, liver disease, and cancer, or other medical condition that places them at higher risk for coronavirus, as defined by the Centers for Disease Control and Prevention.”)

<sup>29</sup> PENNSYLVANIA DEPARTMENT OF CORRECTION, FY 2016-17 BUDGET REQUEST, SENATE APPROPRIATIONS COMMITTEE 8, available at <https://www.cor.pa.gov/Documents/2016-2017%20DOC%20Appropriations%20Testimony.pdf>; PENNSYLVANIA DEPARTMENT OF CORRECTION, ANNUAL STATISTICAL SUPPORT 2018, available at <https://www.cor.pa.gov/About%20Us/Statistics/Documents/Reports/2018%20Annual%20Statistical%20Report.pdf>;

<sup>30</sup> That is, they amount to 2518 people of the total 10,498 incarcerated elderly. *Id.* at 22, 25.

<sup>31</sup> For instance, in sharp contrast to younger offenders, the U.S. Commission Study found that only 13.4% of offenders age 65 or older at the time of release were rearrested with an eight-year follow-up period. See

THE U.S. SENTENCING COMMISSION, THE EFFECTS OF AGING ON RECIDIVISM AMONG FEDERAL OFFENDERS 3 (2017), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207\\_Recidivism-Age.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf); see also Jalila Jefferson, A LITTLE CHILD SHALL LEAD THEM: JUVENILE JUSTICE, AGING OUT, AND THE FIRST STEP ACT 2 (forthcoming) (“Based upon the aging out theory, many scholars agree that incarceration of most classes of elderly offenders is not necessary to deter crime.”).

<sup>32</sup> WETZEL, FY 2020-21 BUDGET TESTIMONY, *supra* note 17, at 12.

<sup>33</sup> Letter from Philadelphia FIGHT and public health advocates urging Governor Wolf and Secretary Levine to act to stop the spread of COVID-19 in Pennsylvania’s prisons, April 7, 2020, available at <https://www.scribd.com/document/455407893/Public-Health-Advocates-Letter-to-Governor-Wolf>.

<sup>34</sup> *Id.*

<sup>35</sup> Joseph Darius Jaafari, *As counties reopen, what about the correctional facilities inside their borders?*, PA POST (Feb. 15, 2010), <https://papost.org/2020/05/14/as-counties-reopen-what-about-the-correctional-facilities-inside-their-borders/>.

<sup>36</sup> *Id.*

<sup>37</sup> David M. Reutter, *Swine Flu Widespread in Prisons and Jails, but Deaths are Few*, PRISON LEGAL NEWS (Feb. 15, 2010), <https://www.prisonlegalnews.org/news/2010/feb/15/swine-flu-widespread-in-prisons-and-jails-but-deaths-are-few>.

<sup>38</sup> Josiah Rich et al., *We Must Release Prisoners to Lessen the Spread of Coronavirus*, WASH. POST (March 17, 2020), <https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-lessen-spread-coronavirus/>.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *In re Petition of the Pa. Prison Soc’y*, 2020 WL 3109546 (Pa. Apr. 3, 2020) (Saylor, C.J., concurring).

<sup>42</sup> WOLF, REPRIEVE ORDER, *supra* note 26.

<sup>43</sup> *Id.*

<sup>44</sup> *See e.g.* NYU Executive Action Report, *supra* note 27.

<sup>45</sup> Ill. Exec. Order No. 19 (April 6, 2020), <https://www2.illinois.gov/Pages/Executive-Orders/Executive-Order2020-21.aspx>. The Governor did so pursuant to his emergency powers, allowing him to “suspend the provisions of any regulatory statute prescribing procedures for conduct of State business. . . if strict compliance...would in any way prevent, hinder, or delay necessary action...in coping with the disaster” and “To control ingress and egress to and from a disaster area, the movement of persons within the area, and the occupancy of premises therein.” 20 I.L.C.S. § 3305 7(1) & 7(8).

<sup>46</sup> *Id.*

<sup>47</sup> Colo. Exec. Order No. D 2020 016 (Mar. 25, 2020), <https://drive.google.com/file/d/18o0yWHzZleH-J87hmgLuBmXwpM8R74Q5x/view>.

<sup>48</sup> Colo. Department of Corrections Memorandum on Colo. Exec. Order No. D 2020 043 (May 6, 2020), <https://drive.google.com/file/d/1leD-0jXWR9lbUxS3DLIik37mffx6Duv2/view>

<sup>49</sup> Daniel A. Gross, *“It Spreads Like Wildfire”: The Coronavirus Comes to New York’s Prisons*, NEW YORKER (March 24, 2020), <https://www.newyorker.com/news/news-desk/it-spreads-like-wildfire-covid-19-comes-to-new-yorks-prisons>.

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