

U.S. House of Representatives Committee on the Judiciary  
Subcommittee on Crime, Terrorism, and Homeland Security

The First Step Act, The Pandemic, and Compassionate Release:  
What Are the Next Steps for the Federal Bureau of Prisons?

Written Testimony Submitted By:

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January 21, 2022

Chairman Nadler, Subcommittee Chair Jackson-Lee, and members of the Subcommittee, thank you for inviting me to testify on the BOP's response to the pandemic and compassionate release. For the more than 157,000 people currently locked away in federal custody,<sup>1</sup> the topics the Committee will address today are, quite literally, a matter of life or death.

My name is Alison K. Guernsey, and I am a former Assistant Federal Public Defender and, now, a Clinical Associate Professor at the University of Iowa College of Law where I direct the Federal Criminal Defense Clinic. Since August 2019—before the pandemic—more than 30 law students and I have worked together to represent people across the country seeking release from federal prison under 18 U.S.C. § 3582(c), the compassionate-release statute.

Our compassionate-release work changed when COVID-19 hit. In addition to direct litigation, we have spent the past 22 months listening to the stories our clients and non-clients, alike, have conveyed about the horrific pandemic-related conditions of confinement in federal prisons, privately managed facilities with federal contracts, and U.S. Marshal custody. We have spent the past 22 months receiving the angry and desperate pleas of the family members and friends of those people we have locked away as they described their loved ones' experiences or tried to make sense of how and why a family member or friend died. And we have spent the past 22 months tracking and attempting to verify the BOP's infection and death data to ensure that what is happening behind bars is not easily misrepresented or erased.

Simply and pointedly stated, in March 2020 our prisons became death traps. And given the BOP's inability or reticence to control the spread of COVID-19 behind bars by engaging in aggressive evidence-based public-health measures, including decarceration, they remain dangerous today.

In my remarks, I will start by highlighting my concerns over the BOP's lack of transparency about the number of deaths of people in federal custody from COVID-19, as well as concerns about the real infection rate in its facilities. I will then highlight the difficulties that inaccurate, incomplete, and delayed data poses for people who are incarcerated, advocates, and the federal-court system that has been tasked under 18 U.S.C. § 3582(c) with deciding whether to allow someone to return home through compassionate release. I will conclude by highlighting several modest things that the BOP can do, today, to help preserve human life.

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<sup>1</sup> Fed. Bureau of Prisons, Population Statistics, [https://www.bop.gov/about/statistics/population\\_statistics.jsp](https://www.bop.gov/about/statistics/population_statistics.jsp) (last visited Jan. 18, 2022)

## 1. BOP Death Rates Are Inaccurate and Unverifiable

*First*, the death rates. According to the current publicly available data from the BOP's website, as of January 19, 2022, 277 people have died from COVID-19 while housed in federal facilities.<sup>2</sup> This number includes people who died in prisons, halfway houses, or while on home confinement. This number is suspect for several reasons.

Principally, the BOP is often slow to report deaths of people living in its institutions. This means that on any given day, advocates, lawyers, and people living behind bars can identify people that they know have died but who are not reflected in the publicly reported data. Two recent examples include Bree Eberbaugh and Rebecca Marie Adams, two women who were incarcerated at FPC Alderson when they died. Ms. Adams<sup>3</sup> died on January 12, 2022, while Ms. Eberbaugh<sup>4</sup> died just two days later, on January 14, 2022.

At the time of their deaths (and currently), FPC Alderson was undergoing a COVID-19 outbreak. On December 1, 2021, there was only one reported infection at the institution.<sup>5</sup> But by December 15, 2021, there were 56.<sup>6</sup> And by December 26, 2021, there were 124.<sup>7</sup> As of January 19, 2022, the number remains at 71.<sup>8</sup> Although the BOP reports that approximately 184 people have “recovered,”<sup>9</sup>—assuming this data is accurate<sup>10</sup>—for a prison with a population of 677,<sup>11</sup> these current numbers suggest that approximately 38% of the population has been or is currently infected with COVID-19.

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<sup>2</sup> Fed. Bureau of Prisons, *COVID-19 Cases*, <https://www.bop.gov/coronavirus/> (last visited Jan. 18, 2022).

<sup>3</sup> Fed. Bureau of Prisons, Find an Inmate, Rebecca Marie Adams, Register Number 35136-057 (reported deceased 1/12/2022).

<sup>4</sup> Fed. Bureau of Prisons, Find an Inmate, Bree Eberbaugh, Register Number 15134-088 (reported deceased 1/14/2022).

<sup>5</sup> University of Iowa College of Law, Federal Criminal Defense Clinic, *Compassionate Release: Graphing COVID Cases in the Bureau of Prisons*, <https://law.uiowa.edu/compassionate-release-work> (last updated Jan. 20, 2022).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Fed. Bureau of Prisons, *COVID-19 Cases*, <https://www.bop.gov/coronavirus/> (last visited Jan. 19, 2022).

<sup>10</sup> *See infra* Part 2.

<sup>11</sup> Fed. Bureau of Prisons, FPC Alderson, <https://www.bop.gov/locations/institutions/ald/> (last visited Jan. 19, 2022).

Even though Ms. Eberbaugh’s and Ms. Adams’s deaths took place during this COVID outbreak, and even though there is no question they died from COVID—Ms. Adams had “tested positive” and been on a ventilator<sup>12</sup> and Ms. Eberbaugh suffered from several conditions that the CDC listed as rendering a person more vulnerable to serious illness or death<sup>13</sup>—as of January 19, 2022, the BOP has yet to count their deaths in its tally:

<u>Facility</u>	<u>Inmates Positive</u>	<u>Staff Positive</u>	<u>Inmate Deaths</u>	<u>Staff Deaths</u>	<u>Inmates Recovered</u>	<u>Staff Recovered</u>	<u>City</u>
Alderson FPC	71	4	0	0	184	39	Alderson

It is only because of the work of incarcerated people and their advocates that people, like me, who attempt to track and monitor this data can identify, in real time, what is happening in our prisons.<sup>14</sup>

I do not mean to imply that the BOP will never count Ms. Eberbaugh, Ms. Adams, or others in its tally or that it is delaying intentionally. It is likely, with time, it will rightly include the deaths that occur at FPC Alderson and other institutions in its total. It has done so belatedly in other cases. To provide just one example, Gregory Ziglar died of COVID-19 in BOP custody on January 29, 2021. But the BOP did not report his death publicly until January 3, 2022, almost a year later<sup>15</sup>:

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<sup>12</sup> *United States v. Adams*, 1:19-cr-00546-NCT, Doc. 71 (Gov’t Response to Mox for Compassionate Release) (MDNC Jan. 11, 2022).

<sup>13</sup> *United States v. Eberbaugh*, 2:18-cr-00222, Doc. 130 (Mox for Compassionate Release) (SD W. Va. July 30, 2020).

<sup>14</sup> As an example, Ms. Dianthe D. Martinez-Brooks, a woman who was formerly incarcerated at FCI Danbury, see *Martinez-Brooks et al v. Easter et al*, 3:20-cv-00569-MPS (D. Conn) and who maintains close communication with women still inside is the one who notified me of the two deaths at FPC Alderson on the day they occurred.

<sup>15</sup> Fed. Bureau of Prisons, Press Release, *Inmate Death at USP Lewisburg* (Jan. 3, 2022), <https://tinyurl.com/2ddxsvba>.



U. S. Department of Justice  
Federal Bureau of Prisons

**FOR IMMEDIATE RELEASE**  
January 3, 2022

Contact: Office of Public Affairs  
202-514-6551

**Inmate Death at USP Lewisburg**

WASHINGTON, D.C.: On Friday, January 29, 2021, inmate Gregory Ziglar was found unresponsive at the United States Penitentiary (USP) Lewisburg in Lewisburg, Pennsylvania. Responding staff immediately initiated life-saving measures. Staff requested emergency medical services (EMS) and life-saving efforts continued. Mr. Ziglar was transported by EMS to a local hospital. Subsequently on the same day, Mr. Ziglar, who had long-term, pre-existing medical conditions which the Centers for Disease Control and Prevention (CDC) lists as risk factors for developing more severe COVID-19 disease, was pronounced deceased by hospital staff. Mr. Ziglar tested positive for COVID-19 post-mortem. Following an autopsy, it was determined Mr. Ziglar's death was likely related to COVID-19.

This delay occurred even though non-publicly available data showed clearly that the BOP knew that Mr. Ziglar had died of COVID well before January of this year. In fact, Mr. Ziglar's name appears on a list of people who died from COVID that the BOP provided in its response to a Freedom of Information Act ("FOIA") request on June 16, 2021:

93241-083	ZIGLAR, Gregory	1/29/2021	LEW	Pulmonary	U07.1	COVID-19, virus identified
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The fact that the information the BOP reports on its website could end up being accurate over time, however, does not alleviate the concern. The delay obfuscates the reality of COVID-19's current impact on people in prison and undermines the reliability of the BOP's reporting. And that, as I will discuss below, has grave legal and public-health implications.

A second concern about the reliability of the BOP's death number is that it does not include the people who have died in privately managed prisons with federal contracts. Nor does the BOP even accurately report that data when it attempts to do so separately. For example, apart from the 277 deaths previously mentioned, as of January 19, 2022, the BOP website reports seven deaths in "private facilities":<sup>16</sup>

<sup>16</sup> Fed. Bureau of Prisons, *COVID-19 Cases*, <https://www.bop.gov/coronavirus/> (last visited Jan. 18, 2022).

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Private Facilities

Privately-managed prisons are secure institutions operated by private companies under contract and oversight of the BOP. The majority of federal inmates in private prisons are sentenced criminal aliens who will be deported upon completion of their sentence. Unlike federal inmates housed in BOP facilities, the contractor is responsible for the medical care and the costs associated with providing those services.

The BOP has 6,358 inmates in Privately-Managed Facilities. There are 152 inmates who have open lab-confirmed positive cases. 303 inmates have recovered. Full breakdown and additional details are below:

Facility	Inmates Positive	Inmate Deaths	Inmates Recovered	City	State
Reeves III CI	85	1	37	Pecos	TX
North Lake CI	35	2	123	Baldwin	MI
McRae CI	25	1	43	Mcrae Helena	GA
Giles W. Dalby CI	7	3	100	Post	TX

All inmates are being appropriately treated and isolated per CDC guidelines.

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But six months ago, on June 2, 2021, it was reporting nine deaths in “private facilities”:

Due to the rapidly evolving nature of this public health crisis, the BOP will update the open COVID-19 confirmed positive test numbers, recoveries, and the number of COVID-19 related deaths each weekday at 3:00 p.m. The positive test numbers are based on the most recently available confirmed lab results involving open cases from across the agency as reported by the BOP's Office of Occupational Health and Safety at 11:00 a.m. each day. BOP field sites may report additional updates throughout the day. Data is subject to change based on additional reporting.

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The BOP has 9,087 inmates in Privately-Managed Facilities. There are 0 inmates who have open lab-confirmed positive cases. 848 inmates have recovered. Full breakdown and additional details are below:

Facility	Inmates Positive	Inmate Deaths	Inmates Recovered	City	State
Big Spring (Flightline) CI	0	1	33	Big Spring	TX
Big Spring CI	0	1	531	Big Spring	TX
Giles W. Dalby CI	0	3	97	Post	TX
McRae CI	0	1	32	Mcrae Helena	GA
North Lake CI	0	2	123	Baldwin	MI
Reeves III CI	0	1	32	Pecos	TX

All inmates are being appropriately treated and isolated per CDC guidelines.

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And a FOIA returned just 8 days later, on June 10, 2021, listed eighteen deaths.<sup>17</sup>

When this discrepancy was brought to the BOP’s attention, Scott Taylor, from the BOP’s Office of Public Affairs explained that the deaths had been removed from the site because people with federal holds no longer reside at the private facilities.<sup>18</sup> In other words, the federal contracts had expired. But the simple fact that privately managed facilities no longer incarcerate people with federal, criminal holds does not resurrect the people who contracted COVID-19 and died there when the facilities did.

For those seeking accurate data about the BOP’s death rate, a FOIA appears to

<sup>17</sup> University of Iowa College of Law, Federal Criminal Defense Clinic, *Compassionate Release: People Who Have Died in Federal Custody*, <https://law.uiowa.edu/compassionate-release-work> (last updated Jan. 20, 2022).

<sup>18</sup> Email from Scott Taylor, BOP Office of Public Affairs, to Keri Blakinger, The Marshall Project (Apr. 8, 2021), <https://tinyurl.com/2sduwst>.

be the best option. But, again, the data is confusing. In a FOIA returned on September 9, 2021, the BOP reported 252 deaths from COVID-19 between March 2020 and June 16, 2021, including deaths in privately managed facilities.<sup>19</sup> But for this same period across the same types of institutions, the BOP's website reported 257 deaths.

Who are the five people the BOP website listed as being deceased but who were not included on the FOIA? It is impossible to tell because the BOP does not provide press releases for all of the deaths that occur in its facilities.<sup>20</sup> And yet it is the press releases that provide valuable and necessary information about who has died, when they died, why they died, and where they died. Without these details, cross checking the number of deaths reported on the BOP's website with the information available through the FOIA process is impossible, and the real death toll remains unclear.

A third concern about the BOP's death statistics are that they are inaccurate because they do not include the people who caught COVID-19 in the BOP, became severely and gravely ill while incarcerated, and who were then granted compassionate release on their death beds. In other words, the people who, upon release, did nothing more than die free. One recent example also comes from FPC Alderson: Juanita Haynes. Ms. Haynes was granted compassionate release on January 3, 2022.<sup>21</sup> At the time, she had "been sedated on a ventilator since December 26, 2021, unable to maintain oxygen levels above fifty percent."<sup>22</sup> Because Ms. Haynes died out of BOP custody<sup>23</sup> she will never be included in the BOP's data. And it's only because of the work of advocates in and out of prison that we know her name.<sup>24</sup>

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<sup>19</sup> I have filed two follow-up FOIA requests since receiving this information in September 2021. Both remain outstanding.

<sup>20</sup> As of January 18, 2022, the BOP has published 257 press releases for deaths in its facilities. Fed. Bureau of Prisons, News Stories [https://www.bop.gov/resources/news\\_stories.jsp#](https://www.bop.gov/resources/news_stories.jsp#). Excluding the people who died in privately managed facilities with federal contracts, there are currently at least 20 missing press releases. That means that there are at least 20 people whom we cannot name or track.

<sup>21</sup> *United States v. Haynes*, 2:18-cr-00261, Doc. 119 (Order Granting Compassionate Release) (Jan. 3, 2022).

<sup>22</sup> *Id.* at 7.

<sup>23</sup> Legacy, Juanita Carrie Haynes, Obituary, <https://tinyurl.com/2p9bbzys> (last visited Jan. 20, 2022).

<sup>24</sup> For example, Wendy Hechtman, a person who was formerly incarcerated at FCI Danbury and who does advocacy work on behalf of people in the criminal-legal system, alerted me to Ms. Haynes's case and subsequent death.

In short, the BOP's claim that 277 people have died from COVID in federal facilities is inaccurate. That number is missing at least 18 people who have died in privately managed prisons and an unknown number of other people the BOP has not timely counted or will never count because they were released just in time to die.

## 2. The BOP Infection Rates Are Inaccurate and Unreliable

*Second*, the infection rates. The concerns with the BOP's recordkeeping do not stop with deaths, but they also extend to its daily and cumulative infection numbers. With respect to cumulative infection numbers over time, there is no dispute that they are inaccurate. In fact, a BOP spokesperson confirmed to The Marshall Project in April 2021 that the cumulative COVID-19 infection data the BOP reports does not include anyone who caught COVID-19 in prison but who was then released.<sup>25</sup>

The admission that the data was inaccurate was not surprising, however. The University of Iowa College of Law's Federal Criminal Defense Clinic has been tracking the reported cumulative infection rate for each BOP facility on a daily basis since August 2020.<sup>26</sup> Given the BOP's data supposedly includes both positive and recovered people,<sup>27</sup> the total number of people infected should never drop. It should either remain constant—if there are no new infections—or increase as the virus spreads. But that is not what the BOP is reporting.

Instead, the cumulative totals signal a certain number of infected and recovered people one day, only to have that number decrease the next.<sup>28</sup> The BOP has been undercounting the infection rate by thousands.<sup>29</sup> The impact of the undercounting is stark when merely glancing at less than one month of reporting for just a few federal facilities. All the red boxes are red flags. They signal dates when the infection rate

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<sup>25</sup> The Marshall Project, *A State-by-State Look at Coronavirus in Prisons*, <https://tinyurl.com/2vbhh2mf> (last visited Apr. 12, 2021); see also Joshua Manson & Liz DeWolf, *The Federal Bureau of Prisons Is Even Less Transparent than We'd Thought* (Apr. 2, 2021), <https://uclacovidbehindbars.org/blog/bopdata>.

<sup>26</sup> University of Iowa College of Law, Federal Criminal Defense Clinic, *Compassionate Release: Graphing COVID Cases in the Bureau of Prisons*, <https://law.uiowa.edu/compassionate-release-work> (last updated Jan. 20, 2022).

<sup>27</sup> Fed. Bureau of Prisons, *COVID-19 Cases*, <https://www.bop.gov/coronavirus/> (last visited Apr. 12, 2021) (noting data includes “confirmed positive test numbers” and “recoveries”).

<sup>28</sup> University of Iowa College of Law, Federal Criminal Defense Clinic, *Compassionate Release: Graphing COVID Cases in the Bureau of Prisons*, <https://law.uiowa.edu/compassionate-release-work> (last updated Jan. 20, 2022).

<sup>29</sup> Joshua Manson & Liz DeWolf, *The Federal Bureau of Prisons Is Even Less Transparent than We'd Thought* (Apr. 2, 2021), <https://uclacovidbehindbars.org/blog/bopdata>.



dropped. Dates when we cannot trust the data<sup>30</sup>:

	7-Dec	8-Dec	9-Dec	10-Dec	13-Dec	14-Dec	15-Dec	16-Dec	17-Dec	20-Dec	21-Dec	22-Dec	23-Dec	28-Dec	29-Dec	30-Dec
ACS Corrections (RRC)	7	7	7	7	7	7	7	7	7	6	6	6	6	5	5	5
Fort Dix FCI	1725	1723	1722	1722	1721	1721	1717	1711	1711	1713	1713	1711	1711	1706	1706	1706
Seagoville FCI	1098	1098	1098	1098	1097	1096	1096	1094	1093	1092	1092	1090	1089	1090	1090	1088
Tuscon USP	991	990	989	989	987	986	986	985	985	985	985	985	985	986	986	987
Beaumont Low FCI	1008	998	995	994	994	991	988	988	985	985	983	984	983	984	985	983
Elkton FCI	831	830	829	829	829	828	825	825	824	825	825	820	820	818	818	819
Carswell FMC	613	612	609	609	608	611	610	606	605	609	607	608	612	638	649	673
Lexington FMC	663	663	665	664	664	664	664	663	663	663	662	660	658	686	689	688
Texarkana FCI	769	767	764	764	763	762	762	761	761	762	761	760	760	761	760	758
Pekin FCI	747	747	746	748	748	748	748	747	747	748	749	750	750	751	751	751
Florence FCI	662	661	661	661	661	661	660	659	658	658	658	657	655	652	648	649
Fort Worth FMC	688	688	687	687	688	687	686	686	686	684	688	688	687	695	694	696
Loretto FCI	690	690	690	688	688	684	684	684	684	684	683	685	682	678	679	684
Marion USP	706	706	705	706	705	704	704	700	700	700	700	697	695	696	695	717
Terre Haute USP	735	734	734	735	734	735	735	733	733	733	733	731	731	731	731	731
Greenville FCI	696	696	696	697	696	696	696	696	694	695	696	696	696	694	694	694
Big Spring FCI	701	701	702	702	701	700	702	698	698	698	698	698	696	693	694	694
Leavenworth USP	709	707	707	706	706	704	705	704	702	703	703	699	699	698	699	699
Manchester FCI	695	695	694	692	692	694	693	693	693	694	695	694	695	697	698	697
Brooklyn MDC	438	439	440	440	440	441	441	441	441	441	446	464	465	474	545	582
Oxford FCI	645	643	643	643	644	647	647	645	643	645	645	645	644	643	643	643
Pollock USP	642	642	642	642	642	641	642	643	643	643	643	643	643	644	645	647
Forrest City Low FCI	665	665	663	664	664	664	663	660	661	661	661	659	658	657	657	657
Thomson USP	610	610	610	611	610	610	611	611	611	610	609	608	609	611	611	610
Lee USP	640	640	641	641	640	640	641	641	641	641	641	640	640	639	639	639
Springfield MCFP	625	624	622	622	622	621	621	620	620	621	621	620	619	620	621	621
Victorville Medium I FCI	597	597	597	597	595	596	596	596	595	594	594	594	593	594	597	597
Pollock FCI	569	567	568	568	593	596	596	596	596	597	601	601	601	604	605	609
Sandstone FCI	629	628	627	627	627	627	626	627	627	627	627	627	624	624	621	620
Oklahoma City FTC	520	520	520	518	519	519	517	516	516	518	517	515	515	514	515	515
Englewood FCI	609	608	608	607	607	607	607	607	608	607	606	605	604	605	605	605
Terminal Island FCI	511	512	511	512	513	513	511	511	511	511	508	509	508	507	508	509

It is no surprise that UCLA Law School’s COVID-19 Behind Bars Data Project has given the BOP’s data-reporting an “F.”<sup>31</sup>

In addition to problems with the accuracy of the cumulative infection totals for each facility over time, the daily infection numbers that the BOP is reporting are also concerning. The infection-rate data is only as good as the BOP’s testing.<sup>32</sup> If the BOP does not test, then the infection rates will not increase, even though people are sick. Unfortunately, the BOP’s publicly available data on testing sheds very little light on what is happening in its facilities. As Hope Johnson, a data fellow at UCLA Law School’s COVID-19 Behind Bars Project has noted, the BOP reports only one testing variable for incarcerated people: the “number of incarcerated people tested.”<sup>33</sup> This

<sup>30</sup> The full spreadsheet can be found at: University of Iowa College of Law, Federal Criminal Defense Clinic, *Compassionate Release: Graphing COVID Cases in the Bureau of Prisons*, <https://law.uiowa.edu/compassionate-release-work> (last updated Jan. 20, 2022).

<sup>31</sup> Joshua Manson & Liz DeWolf, *The Federal Bureau of Prisons Is Even Less Transparent than We’d Thought*, UCLA Law COVID Behind Bars Data Project (Apr. 2, 2021), <https://uclacovidbehindbars.org/blog/bopdata>.

<sup>32</sup> Cf. Erika Tyagi, Neal Marquez, and Joshua Manson, *A Crisis of Undertesting: How Inadequate COVID-19 Detection Skews the Data and Costs Lives*, UCLA Law COVID Behind Bars Data Project (Oct. 2021), [https://uclacovidbehindbars.org/assets/cfr\\_report\\_final.pdf](https://uclacovidbehindbars.org/assets/cfr_report_final.pdf).

<sup>33</sup> Fed. Bureau of Prisons, *COVID-19 Inmate Test Information*, <https://www.bop.gov/coronavirus/> (last visited Jan. 19, 2022). Most jurisdictions report the “number of tests administered.”

means that even if the same person has been tested many times throughout the course of the pandemic, they are counted only once by the BOP. Conveying only this variable provides no indication of how often and when—between March 2020 and today—the BOP has administered tests.<sup>34</sup> But this is key data needed to understand “whether a low positivity rate reflects actually low COVID-19 prevalence, confirmed by mass testing, or just the tip of a much larger and undetected outbreak, concealed by insufficient testing.”<sup>35</sup>

Moreover, setting aside the infection and testing numbers the BOP has reported, people residing in federal facilities and their advocates have consistently complained about chronic undertesting. Incarcerated people with whom I’ve spoken in various facilities across the country have reported that some facilities refuse to test people who have already contracted COVID-19 or who previously tested negative.<sup>36</sup> Other facilities decline to test asymptomatic people, even though they necessarily reside in close proximity with people who have tested positive.<sup>37</sup>

In short, without being able to determine whether the BOP has been appropriately testing throughout the life of the pandemic, both in terms of timing and volume, it is impossible to verify whether the reported daily infection rates are accurate at any given time. Instead, they are an undercount and an unreliable measure of the extent of carceral spread.

### **3. Inaccurate Death and Infection Rate Data Matters for Compassionate Release and Public Health**

So, why does the BOP’s data matter? It matters because accurate, timely reporting about deaths and infections in federal prison facilities is critical from both a legal and public-health perspective.

First, the legal. Federal courts routinely rely on the BOP’s COVID-19 death and infection-rate data in evaluating the danger a person may face in prison and then

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<sup>34</sup> Fed. Bureau of Prisons, *COVID-19 Inmate Test Information*, <https://www.bop.gov/coronavirus/> (last visited Jan. 19, 2022).

<sup>35</sup> Written Joint Statement of Aaron Littman, Lauren Brinkley-Rubinstein, Michele Deitch Before the Senate Judiciary Committee, *Oversight Hearing to Examine the Federal Bureau of Prisons* (Apr. 15, 2021), <https://tinyurl.com/43xd8xd8>.

<sup>36</sup> *Robinson v. Pullen*, 3:22-cv-00094-SRU, Doc. 1 at 1, 6 (Jan. 18, 2022) (petition under 28 U.S.C. § 2241).

<sup>37</sup> *Id.* at 7.

deciding whether to grant motions for compassionate release.<sup>38</sup> To qualify for compassionate release, the incarcerated person must demonstrate that an “extraordinary and compelling” reason justifies a reduced sentence.<sup>39</sup> Although many courts have used their discretion to conclude “extraordinary and compelling” reasons for release include the dangers that COVID-19 poses in BOP custody, fear over a “generalized” or “speculative” risk of contracting COVID-19 is insufficient to meet the standard.<sup>40</sup> For this reason, over the course of this pandemic, prosecutors routinely claim in their oppositions to motions for compassionate release that the BOP is taking appropriate action to prevent the spread of COVID-19 and that the BOP data about infections and deaths bear this out<sup>41</sup>:

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BOP’s efforts have been fruitful. There is no way to stop this virus short of widespread vaccination. Some inmates inevitably will be infected and some of that cohort may succumb, just as in the population at large. However, the rate of deaths in federal prisons as a whole has been lower than that in the general U.S. population, a notable achievement given the known risks of viral spread in a congregate prison setting.

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<sup>38</sup> *United States v. Doe*, 833 F. App’x 366, 367 n.3 (3d Cir. 2020) (“We note that, despite Doe’s unsupported argument that FCI Cumberland staff took inadequate precautions in July 2020, the Bureau of Prisons currently is reporting no active cases of COVID-19 among FCI Cumberland inmates or staff.”); *United States v. Freed*, 845 F. App’x 198, 200 (3d Cir. 2021) (“The Court held that Freed had not established ‘extraordinary and compelling circumstances,’ in part because he could not demonstrate ‘an actual, non-speculative, and non-generalized risk of exposure to COVID-19’ at FCI Fort Dix, where he is serving his sentence. At that time, there were no COVID cases at Fort Dix.”); *United States v. Zirkelbach*, No. 13-CR-1001-CJW-MAR, 2021 WL 3609299, at \*5 (N.D. Iowa Aug. 11, 2021 (noting “the concerns about a disproportionate risk of contracting the virus are unfounded. . . . [T]here is now only one active case of COVID-19 among the inmates at Forrest City Medium FCI”).

<sup>39</sup> 18 U.S.C. § 3582(c)(1).

<sup>40</sup> *Doe*, 833 F. App’x at 367; see also *United States v. Petty*, No. 2:18-CR-53(4), 2020 WL 7047300, at \*2 (S.D. Ohio Dec. 1, 2020); *United States v. Koons*, 2020 WL 1940570, at \*5 (W.D. La. Apr. 21, 2020) (“General concerns about the spread of COVID-19 or the mere fear of contracting an illness in prison are insufficient grounds to establish the extraordinary and compelling reasons necessary to reduce a sentence.”)

<sup>41</sup> *United States v. Hopkins*, 1:06-cr-00227-RBW, Doc. 484 at 15 (D.C.D.C. Dec. 21, 2021)

But, as outlined above, the figures on which prosecutors and the courts have been relying are inaccurate. And if courts are misjudging the risk of COVID-19 in federal prison based on flawed data, then we are unjustifiably incarcerating people who are at medical risk in contravention of the First Step Act’s desired expansion of 18 U.S.C. § 3582(c).<sup>42</sup>

Turning quickly to compassionate release generally, the fact that most of the releases from federal custody during the pandemic have come through defendant-initiated motions with the federal courts, as opposed to the BOP, speaks volumes about the BOP’s unwillingness to use the decarceration tools at its disposal to protect human life. In calendar year 2020, the BOP approved only 43 requests for sentence reductions.<sup>43</sup> And, according to the most recent data publicly available, in the first quarter of calendar year 2021, the BOP approved 9 requests for sentence reductions.<sup>44</sup> This is compared to the over 3,000 motions for compassionate release granted by the federal courts between January 1, 2020, and June 30, 2021.<sup>45</sup>

A review of the number of people who died in BOP custody after seeking compassionate release gives us just a taste of how a more robust use of compassionate release at the BOP level could have saved additional lives.

As of January 18, 2021, seventy-two of the approximately 274 people we can identify by name<sup>46</sup> as having died in federal custody passed away after seeking compassionate release.<sup>47</sup> To say that only seventy-two of the people who died had filed for compassionate release, however, is certainly an undercount. This number includes only those people who eventually filed their request with a federal district court upon getting nowhere with the BOP. The number of people who asked for compassionate release from the BOP before dying and who never filed with a federal district court is unknown—that data does not appear publicly—but it is undoubtedly

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<sup>42</sup> See *infra* n. 67

<sup>43</sup> U.S. Dep’t of Justice, Federal Prison System, *FY 2022 Performance Budget Congressional Submission* 28 (2021), <https://www.justice.gov/jmd/page/file/1398306/download>

<sup>44</sup> *Id.*

<sup>45</sup> U.S. Sentencing Comm’n, *Compassionate Release Data Report, Calendar Years 2020 to 2021* (Sept. 2021), <https://tinyurl.com/2eztkaj7>.

<sup>46</sup> This number includes the 256 people for whom the BOP has issued a press release plus the 18 individuals on the BOP’s private prison FOIA. (Although there are 257 press releases, see *supra* n. 20, one of those press releases merely identifies the person as John Doe making it impossible to track his case).

<sup>47</sup> See University of Iowa College of Law, Federal Criminal Defense Clinic, *Compassionate Release: People Who Have Died in Federal Custody*, <https://law.uiowa.edu/compassionate-release-work-federal-courts> (last updated Jan. 20, 2022).

much higher.

But even assuming only seventy-two of those who died requested compassionate release from the BOP, in not even one of those cases did the BOP move for release on the person's behalf. This is even though in almost every single press release it issued announcing a new death, the BOP touted the person's pre-existing medical conditions as a purported explanation.<sup>48</sup>

As Assistant Federal Defender, Anita Aboagye-Agyeman, and I highlighted in our previous written testimony to the U.S. Senate Committee on the Judiciary in April 2021, an awful example of the BOP's under assessment of risk while a person remains alive is John Rodrigues. Mr. Rodrigues, a 65-year-old man from Hawaii, died on December 15, 2020.<sup>49</sup> Mr. Rodrigues suffered from obesity, diabetes, and kidney disease<sup>50</sup>—conditions the CDC recognizes to be serious risk factors for COVID-19.<sup>51</sup> Despite these conditions, DOJ prosecutors argued against his release on the grounds that the BOP had his care under control and the COVID-19 infection rates at his prison were too low to warrant release.<sup>52</sup> Even when Mr. Rodrigues was hospitalized and struggling to breathe, DOJ prosecutors continued to argue for him to remain in prison because it was safer for him.<sup>53</sup> In its press release announcing Mr. Rodrigues's death, the BOP finally acknowledged what Mr. Rodrigues had been arguing all along: he “had long-term, preexisting medical conditions which the CDC lists as risk factors for developing more severe COVID-19 disease.”<sup>54</sup>

Or, Jaime Benavides, a 49-year-old man from Texas, who died from COVID-

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<sup>48</sup> Fed. Bureau of Prisons, News Stories, COVID-related Inmate Deaths, [https://www.bop.gov/resources/news\\_stories.jsp](https://www.bop.gov/resources/news_stories.jsp) (last visited Jan. 18, 2022).

<sup>49</sup> Fed. Bureau of Prisons, Press Release, Inmate Death at USP Tucson (Dec. 16, 2020), <https://tinyurl.com/jt6rjh98>

<sup>50</sup> *United States v. Rodrigues*, 1:08-cr-00668-JAO, Doc. 177 at 1-2 (D. Hawaii Oct. 8, 2020) (Motion for a Reduced Sentence).

<sup>51</sup> Ctrs. for Disease Control and Prevention, *People with Certain Medical Conditions* (Mar. 29, 2021), <https://tinyurl.com/5zvudb3e>

<sup>52</sup> *United States v. Rodrigues*, 1:08-cr-00668-JAO, Doc. 183 at 12-14 (D. Hawaii Oct. 26, 2020) (Government Response in Opposition to Motion for a Reduced Sentence).

<sup>53</sup> *United States v. Rodrigues*, 1:08-cr-00668-JAO, Doc. 197 at 4 (D. Hawaii Dec. 11, 2020) (Government Supplemental Response in Opposition to a Reduced Sentence).

<sup>54</sup> Fed. Bureau of Prisons, Press Release, Inmate Death at USP Tucson (Dec. 16, 2020), <https://tinyurl.com/jt6rjh98>

19 while being housed at MCFP Springfield.<sup>55</sup> Mr. Benavides was serving a 30-month sentence for a marijuana-trafficking offense,<sup>56</sup> and at the time of his death, he had served 20 of those months.<sup>57</sup> As though his death were not tragic enough, the last months of Mr. Benavides’s life in the BOP must have been horrible. He was first diagnosed with COVID-19 on December 18, 2020.<sup>58</sup> The BOP considered him “recovered” on December 28, 2020, but he was hospitalized on March 25, 2021, as his “condition worsened.”<sup>59</sup> Just days later, on April 4, he died.<sup>60</sup> In the press release, the BOP notes he “had long-term, preexisting medical conditions which the CDC lists as risk factors for developing more severe COVID-19 disease.”<sup>61</sup>

More recently is the case of Lee Cormier, who passed away in BOP custody on December 28, 2021.<sup>62</sup> Prior to his death, Mr. Cormier was incarcerated at FCI Beaumont.<sup>63</sup> He tested positive for COVID-19 on November 6, 2020, and according to the BOP “was converted to the status of recovered.”<sup>64</sup> As outlined in his emergency motion for compassionate release, however, Mr. Cormier’s battle with COVID-19 had left him “ravaged.”<sup>65</sup> Confined to a wheelchair, reliant on other incarcerated people to push him around, and having visited the hospital six times over three weeks, he pleaded with the district court to let him go home to no avail.<sup>66</sup> On December 21, 2021, Mr. Cormier was transferred to a hospital for “shortness of breath” and later died.<sup>67</sup> In the press release announcing Mr. Cormier’s death, the BOP again made sure to highlight that he had “pre-existing medical conditions which

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<sup>55</sup> Fed. Bureau of Prisons, Press Release, Inmate Death at MCFP Springfield (Apr. 7, 2021), <https://tinyurl.com/bxx3p9u3>

<sup>56</sup> *United States v. Benavides*, 5:19-cr-01324, Doc. 36 at 2 (S.D. Tex. Mar. 4, 2020) (Judgment).

<sup>57</sup> *United States v. Benavides*, 5:19-cr-01324, Doc. 4 (S.D. Tex. Aug. 13, 2019) (noting that Mr. Rodrigues was kept in custody at his initial appearance where he remained).

<sup>58</sup> Fed. Bureau of Prisons, Press Release, Inmate Death at MCFP Springfield (Apr. 7, 2021), <https://tinyurl.com/bxx3p9u3>

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Fed. Bureau of Prisons, Press Release, Inmate Death at FCI Beaumont Low (Jan. 5, 2022), <https://tinyurl.com/2p8ufcy2>

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *United States v. Cormier*, 2:02-cr-20100-JDC-KK, Doc. 175 at 2 (W.D.La. Dec. 21, 2021).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

the CDC lists as risk factors for developing more severe COVID-19 disease.”<sup>68</sup>

Not only is Mr. Cormier one of the latest people to die from COVID-19 while in BOP custody despite the BOP’s recognition that he was medically at risk, but he is also the 37th person to die after having been considered recovered by the BOP.<sup>69</sup>

With the passage of the First Step Act of 2018, Congress made clear that it intended the BOP to more broadly use its compassionate-release authority.<sup>70</sup> The BOP had a chance to do so in each of the instances in which people in its custody died. The BOP even publicly recognized, post-mortem, that the people who had died were at risk for more severe illness and death. But these individuals’ stories—and the stories of many others like them—show that the BOP has failed to realize Congress’s intent.

Second, the BOP’s inaccurate reporting has serious public-health implications. Accurate record keeping is a public-health necessity. In February 2021, Senators Elizabeth Warren and Cory Booker, along with Congresswomen Ayanna Pressley and Sylvia Garcia urged Congressional leaders to pass the Corrections Data Transparency Act, a bill that would require, in part, the BOP and U.S. Marshals service to collect and publicly report detailed data about COVID-19 cases, hospitalizations, deaths, and vaccinations in federal, state, and local correctional facilities.<sup>71</sup> That bill currently sits in this Subcommittee.

Public health professionals like Dr. Brie Williams, Professor of Medicine at the University of San Francisco, and Director of AMEND, a training and leadership development program aimed at giving correctional leaders, correctional workers, and policy makers the tools needed to provide better healthcare in prisons, have endorsed

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<sup>68</sup> Fed. Bureau of Prisons, Press Release, Inmate Death at FCI Beaumont Low (Jan. 5, 2022), <https://tinyurl.com/2p8ufcy2>

<sup>69</sup> See University of Iowa College of Law, Federal Criminal Defense Clinic, *Compassionate Release: People Who Have Died in Federal Custody*, <https://law.uiowa.edu/compassionate-release-work-federal-courts> (last updated Jan. 20, 2022).

<sup>70</sup> See 164 Cong. Rec. S7314-02, 2018 WL 6350790 (Dec. 5, 2018) (statement of Senator Cardin, co-sponsor of First Step Act) (“[T]he bill expands compassionate release . . . and expedites compassionate release applications.”); see also *United States v. Brown*, 457 F. Supp. 3d 691, 700 (S.D. Iowa 2020) (noting the First Step Act listed its changes under the title of “Increasing the Use and Transparency of Compassionate Release” (citing First Step Act of 2018, § 603(b), 132 Stat. at 5239)).

<sup>71</sup> H.R. 1072 – COVID-19 in Corrections Data Transparency Act, 117th Congress (2021-2022).

the bill. Dr. Williams notes that “without accurate, timely and comprehensive data about the impact of COVID-19 in prisons, we are at an extraordinary disadvantage in the fight to keep people who live or work in prisons and their surrounding communities safe from the pandemic” and a failure to access and analyze this data today leaves us less prepared to address future infectious disease outbreaks.<sup>72</sup>

#### **4. Modest Proposals for Reform**

The question that remains is this: what must we do now? As my fellow defender, Anita Aboagye-Agyeman, and I have been arguing for over a year,<sup>73</sup> Congress can take modest steps to remedy some of these issues. The steps below are narrow and focused on the issues that I’ve raised in my remarks, and they are in no way intended to be comprehensive.

First, with respect to deaths in custody, Congress should require the BOP to release complete and accurate information about everyone who has died while in federally run facilities, private prisons with federal contracts, and federally controlled halfway houses in a timely manner without the need for a FOIA request. Even if the agency cannot disclose the names of those individuals who have died in the press releases, it should issue “John/Jane Doe” press releases that include the gender, age, race, and information about whether the person suffered from an underlying condition that made them more susceptible to COVID-19. The BOP should also disclose how it tracked deaths in each facility, thereby helping to explain otherwise suspect fluctuations.

Second, with respect to infection rates, the BOP should not be reporting “cumulative” infection rate data that fails to fully account for everyone who has been infected with COVID-19 in its facilities. Removing people who have been released from custody from the total number of infections distorts the real rate of infection overtime. More precise data is needed. Moreover, each facility should be required to identify when it administers tests in each facility and how many people receive those tests at any one time. Without this data it is impossible to determine whether the BOP is undertesting.

Third, with respect to compassionate release, Congress should demand the BOP comply with the directive of the First Step Act of 2018 that already requires it to

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<sup>72</sup> UCSF Geriatrics, Department of Medicine, *Brie Williams and AMEND at UCSF Endorse COVID-19 in Corrections Data Transparency Act*, <https://tinyurl.com/5n8mjm5a>.

<sup>73</sup> Written Testimony Before the U.S. Senate Committee on the Judiciary, Hearing on Oversight of the Federal Bureau of Prisons (Apr. 15, 2021).



track and release statistics about the number of internal compassionate-release requests it has received, the substance of those requests, and the timeline for their disposition.<sup>74</sup>

Many more reforms are required to ensure complete transparency and accountability in the BOP as we continue to grapple with its handling of the pandemic. But as Assistant Federal Defender, Anita Aboagye-Agyeman, and I highlighted last April, we have watched our clients and our colleagues' clients become gravely ill and even die when they were eligible for compassionate release. Their deaths are based, in part, on the failure of the BOP to be transparent about what is happening in its facilities. We believe that increased transparency in reporting and institutional consistency are modest and good places to start in dealing with the pandemic.

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<sup>74</sup> First Step Act of 2018, § 603(b), 132 Stat. at 5240-41.