



Submitted via regulations.gov

July 21, 2022

The Honorable Merrick B. Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Ave, NW
Washington, DC 20530

Re: Proposed Rule, Home Confinement Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act (BOP Docket No. 1179, 1120-AB79)

Dear Attorney General Garland:

FAMM and Professor Sarah F. Russell, Director of the Civil Justice Clinic at Quinnipiac School of Law, submit this comment in response to the recent Proposed Rule interpreting the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).¹ The Proposed Rule would permit individuals placed on home confinement during the COVID-19 emergency to remain on home confinement once the emergency ends. Commenters commend the Department of Justice (“DOJ”) for its ongoing use of its CARES Act authority and for its efforts to use this authority in a manner consistent with the law. Commenters agree with the Comment from the American Civil Liberties Union et al. that, after this rule is finalized, BOP should establish clear procedures—through notice-and-comment rulemaking—for revocation proceedings. This will assure fair notice, help avoid arbitrary and capricious revocations, and ensure the protection of individuals’ due process rights.

FAMM has been an engaged advocate for incarcerated people and their loved ones for three decades. And most recently, FAMM has been actively advocating for rulemaking and guidance to keep people home who were placed on CARES Act Home Confinement. We started the Keep Them Home campaign to mobilize the CARES Act Home Confinement community and share stories of their experiences with policymakers. The Civil Justice Clinic at Quinnipiac School of Law provides direct representation to individuals currently on home confinement who have been re-imprisoned or threatened with re-imprisonment. Both groups work on, and are committed to, the success of individuals on CARES Act Home Confinement.

On April 29, 2022, Attorney General Garland made a public statement that “[r]emoving barriers to successful reentry for previously incarcerated individuals is an important part of the

¹ See Home Confinement Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, 87 Fed. Reg. 36,787 (June 21, 2022) (to be codified at 28 C.F.R. pt. 0) (“Proposed Rule”).

Justice Department’s mission to keep our country safe, uphold the rule of law, and pursue equal justice under the law.”² We could not agree more and appreciate DOJ’s commitment to supporting individuals who are leaving prison.

The law also protects and supports the rights of individuals who are leaving prison. Pursuant to 18 U.S.C. § 3624(c)(1), prerelease custody aims to “afford [a] prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community.”³ Beginning in March 2020, BOP has used expanded home confinement authority to place over 35,000 people on home confinement.⁴ In December 2021, DOJ issued a memo from the Office of Legal Counsel (“OLC Memo”) that confirmed the rights of people on home confinement to remain on home confinement without a looming threat of mass re-imprisonment. When the OLC memo was released, Attorney General Garland “directed that the Department engage in a rulemaking process to ensure that the Department lives up to the letter and the spirit of the CARES Act.”⁵ In his words, this included a promise to exercise authority “so that those who have made rehabilitative progress and complied with the conditions of home confinement, and who in the interests of justice should be given an opportunity to continue transitioning back to society, are not unnecessarily returned to prison.”⁶

To this end, BOP released the Proposed Rule on June 20, 2022. Unfortunately, the Proposed Rule fails to include procedures that BOP will use to determine what alleged violations could trigger re-imprisonment and the process that will be afforded to those accused of serious violations. The absence of procedures and detailed rules regarding re-imprisonment of those on home confinement threatens DOJ’s commitment to successful reentry and reduced recidivism.

In the pages that follow, we share the stories of people on CARES Act home confinement. Their lived experiences demonstrate the real-life consequences stemming from the absence of detailed rules to govern revocation and reincarceration for those on home

² Justice Department Releases Reentry Coordination Council Report Recommending Evidence-Based Approaches to Reduce Barriers to Successful Reentry, Press Release No. 22-449 (Apr. 29, 2022), <https://www.justice.gov/opa/pr/justice-department-releases-reentry-coordination-council-report-recommending-evidence-based>.

³ 18 U.S.C. § 3624(g)(4) (“[T]he Director of the [BOP] shall, to the extent practicable, provide that increasingly less restrictive conditions shall be imposed on prisoners who demonstrate continued compliance with the conditions of such prerelease custody, so as to most effectively prepare such prisoners for reentry.”).

⁴ Discretion to Continue the Home-Confinement Placements of Federal Prisoners After the COVID-19 Emergency, 45 Op. O.L.C. __ (Dec. 21, 2021), at 3-4, <https://www.justice.gov/olc/file/1457926/download>.

⁵ Statement by Attorney General Merrick B. Garland, Press Release No. 21-1283 (Dec. 21, 2021), <https://www.justice.gov/opa/pr/statement-attorney-general-merrick-b-garland-0>.

⁶ *Id.*

confinement. These stories illustrate the urgent need for a rule that clearly delineates what conduct could trigger re-imprisonment and the procedures that will be used to make that determination.

I. The Absence Of Constraints On What Conduct Will Trigger Re-Imprisonment Upends The Lives And Progress Of People On Home Confinement

Individuals who remain on CARES Act Home Confinement for extended periods should be given the same opportunity to adjust to and prepare for reentry as those released to the community in the ordinary course. Individuals placed on CARES Act Home Confinement have been living their lives in accordance with the spirit of the law as well as the DOJ's public statements and memos. CARES Act Home Confinement has afforded thousands of individuals an opportunity to reconnect with family, enroll in school, seek gainful employment, and receive treatment for medical conditions. But even those who are doing all the right things nonetheless live each day with the threat of being re-imprisoned for a miscommunication, a simple misunderstanding, or an alleged violation that is minor in nature. This threat is not abstract; it is real and it jeopardizes the hard work of these individuals and undermines the rehabilitative aims of home confinement. Indeed, BOP reported that as of March 2022, of the 357 people who were re-imprisoned, only eight were re-imprisoned for new criminal conduct.⁷

The impact of re-imprisonment for people on CARES Act Home Confinement is singularly acute given that, unlike people placed on home confinement in the ordinary course—whose home confinement terms can generally be no longer than six months⁸—those placed on CARES Act Home Confinement typically have many months or even years left to serve. This means that their punishment can be exceptionally disproportionate to the violation that triggered it.

BOP should issue a new proposed rule—subject to notice and comment rulemaking—that clearly enumerates the conduct that would warrant return to a correctional facility. It should also make clear that the enumerated conduct is limited to only the most serious and verified violations.

⁷ 87 Fed. Reg. at 36,790. BOP had previously reported that as of late 2021, of the 289 people who were re-imprisoned, 79 were returned for “technical violations” and 152 for “misconduct in violation of program rules.” Memorandum for Christopher H. Schroeder, Assistant Attorney General, Office of Legal Counsel, from Kenneth Hyle, General Counsel, BOP, Re: Views Regarding OLC Opinion, “Home Confinement of Federal Prisoners After the COVID-19 Emergency,” at 6 (Dec. 10, 2021), https://www.aclu.org/sites/default/files/field_document/bop_cares_memo_12.10.21.pdf. The remaining 49 had been returned for “escape,” *id.*, which, as discussed further below, could simply reflect allegations of being in an unauthorized location.

⁸ See 18 U.S.C. § 3624(c).

a. *Misunderstandings and Missed Calls Should Not Lead to Re-imprisonment.*

Re-imprisoning someone for a year based on a misunderstanding is inhumane. And misunderstandings are common given BOP's supervision structure, which relies on private contractors who run halfway houses. People on home confinement interact with a variety of staff members at these private facilities, who often provide informal authorizations for permission to leave their homes for work, medical appointments, or other necessary trips. Confusion abounds. Rulemaking that properly defines the contours of a revocable offense is needed to protect people's dignity and their constitutional rights. Procedures need to be in place so that misunderstandings can be cleared up.

1. Gwendolyn Levi's story

Gwendolyn Levi is a 76-year-old grandmother and cancer survivor. She was released under CARES Act Home Confinement in June 2020, the day before her 75th birthday. Being at home allowed Ms. Levi to be with her 95-year-old mother and repair her relationships with her sons and grandsons.⁹ Ms. Levi also began volunteering with her community. She was reintegrating into a society that had drastically changed during the 16 years she was in prison, by taking computer courses to help with modern employment.¹⁰ Ms. Levi believed that she had authorization from her halfway house to attend a computer class. She turned her cell phone off. Because she was unreachable, Ms. Levi was deemed an escapee for failing to answer her phone while in computer class.¹¹ Her lawyer was told that, even though she was attending a computer class, she would be treated as if she was robbing a bank because, hypothetically, she could have been robbing a bank.¹²

The BOP decided to re-imprison Ms. Levi as a result of the incident. But Ms. Levi was no escapee. She was a 75-year-old woman trying to learn computer skills to aid her reentry from prison. In other words, she was doing exactly what an individual in pre-release community confinement should be doing. Ms. Levi spent three weeks in a D.C. jail before, thanks to good

⁹ Gwen Levi, *I Was Sent Back to Jail for Going to a Computer Class. It's Time to Act on Home Confinement*, Wash. Post (July 15, 2021), <https://www.washingtonpost.com/opinions/2021/07/15/gwen-levi-home-confinement-prison-biden/>.

¹⁰ Neena Satija & Justin Wm. Moyer, *A Grandmother Didn't Answer her Phone During a Class in Baltimore. She was Sent Back to Prison*, Baltimore Sun (July 1, 2021), <https://www.baltimoresun.com/news/crime/bs-wp-md-cr-federal-prisoners-home-confinement-20210701-hoqdc5y7pna6jkrevr6pvak2vq-story.html>.

¹¹ *Id.*

¹² *Id.*

legal counsel and an empathetic judge, the district court granted her compassionate release.¹³ Among other things, the court found that “it would do little (if anything) to serve the goals of sentencing to require her to return to full custody.”¹⁴ And although that was a positive outcome for Ms. Levi, the cost of that time away was significant for her and her family.¹⁵ The three weeks away took a heavy emotional toll on Ms. Levi who feared for her elderly mother, and interrupted the care that Ms. Levi had been able to give to her mother.

2. Jeffrey Martinovich’s story

Ms. Levi is not alone. Many other people on home confinement have found themselves re-imprisoned due to a missed phone call that halfway houses had inaccurately viewed as signaling an escape. One night, Jeffrey Martinovich’s phone line went down and he missed a call from the halfway house operator. He had answered over 1,200 such monitoring phone calls before that night. And his ankle monitor proved that he had never left his house that night. Halfway house operators called local police and told them that Mr. Martinovich’s ankle monitor showed he was at home, but that he was not answering his phone. The police officers mistakenly thought that his residence was a halfway house and so they knocked quietly, so as not to wake the supposed halfway house manager. Court documents show that one officer said, that the “dude who runs it [the halfway house] is probably asleep” as they quietly walked away from the house.¹⁶ Mr. Martinovich was not alerted to the police presence.¹⁷ Nevertheless, the halfway house deemed Mr. Martinovich an escapee and BOP returned him to prison.

Mr. Martinovich and his fiancée were expecting a baby and he had been consistently responsive before that one night. One can only imagine the stress of returning to prison with a new baby on the way for both Mr. Martinovich and his fiancée, Ashley Amburn. Ms. Amburn explained in a letter to the court supporting Mr. Martinovich’s compassionate release request, “words cannot explain the impact the last 41 days has had on our family[] (not knowing where

¹³ NPR, *Gwen Levi and FAMM: a COVID-Era Case for Compassionate Release* (Aug. 17, 2021), <https://www.wypr.org/show/midday/2021-08-17/gwen-levi-and-famm-a-covid-era-case-for-compassionate-release>; see also Memorandum Opinion and Order, *United States v. Martin et al*, 8:04-cr-00235 (DKC) (D. Md. July 6, 2021) (Dkt. 2085-86).

¹⁴ *Id.*

¹⁵ Gwen Levi Advocates for Prison Reform After her Release (Jul. 23, 2021) <https://www.youtube.com/watch?v=ur-UBrz2-d0>.

¹⁶ Mot. to Reduce, *United States v. Martinovich*, 4:15-cr-00050 (MSD) (E.D. Va. July 14, 2021) (Dkt. 167).

¹⁷ Peter Dujardin, *Former Newport News Broker Went Back to Prison in June. He’s Now Being Released to Home Confinement – Again*, Daily Press (July 21, 2021), <https://www.dailypress.com/news/dp-nw-martinovich-return-20210721-2p6rmxztf5f3lnk2rdom24vzny-story.html>.

Jeff is, when I will get to speak to him, where he will end up, how long he will be gone, how I will get through the rest of this pregnancy and care of a baby without him are all constant concerns I think of every second of the day).”¹⁸ Thanks to tireless assistance from counsel who filed both a compassionate release motion and a habeas petition, BOP finally agreed to return Mr. Martinovich home.¹⁹

3. Nordia Tompkins’ story

With the assistance of media attention and diligent lawyers, Ms. Levi and Mr. Martinovich’s stories ended better than most. Other troubling cases with similar circumstances have resulted in much longer periods of re-imprisonment and devastation for families. Take Nordia Tompkins, for example. Ms. Tompkins, a 37-year-old mother, was released to home confinement in June 2020.²⁰ After her release, Ms. Tompkins was able to provide a home for her two teenage daughters, one of whom had been in foster care while she was in prison. She also worked at a car service company and enrolled in cosmetology school, with plans to start her own business in the future. In June 2021, after she had been home for a year, Ms. Tompkins stopped by an AT&T store to get her cell phone fixed on the way home from reporting to the halfway house. She needed the phone to be able to communicate with BOP and she understood from her communications with the halfway house staff that she was authorized to make the stop. Although the halfway house’s GPS tracking showed she was at the AT&T store, Ms. Tompkins nonetheless received an incident report for being in an unauthorized location and was re-imprisoned soon after.²¹ Ms. Tompkins spent almost a year back in prison until BOP released her to a halfway house six months before the end of her sentence. (BOP has not permitted her to return to home confinement.)

These are just a few stories. We have heard similar accounts from many others on home confinement. Although each circumstance is unique, each story leaves us wondering why people’s lives and hard efforts to comply and succeed are being uprooted for simple misunderstandings or for alleged violations that pale in comparison to the consequences of re-imprisonment.

¹⁸ Mot. to Reduce, *United States v. Martinovich*, 4:15-cr-00050 (E.D. Va. July 14, 2021) (Dkt. 167).

¹⁹ Dujardin, *supra* note 17; Consent Mot. for Extension of Time, *Martinovich v. Scales*, No. 2:21-cv-376 (RCY) (E.D. Va. July 22, 2021) (Dkt. 7).

²⁰ See Petition, *Tompkins v. Pullen*, No. 22-CV-391 (OAW) (D. Conn. Mar. 2, 2022) (Dkt. 1).

²¹ In litigation, BOP asserted that Ms. Tompkins was also re-imprisoned based on two other incident reports (from May 2021 and June 2021) for being in “unauthorized locations.” But Ms. Tompkins was not sanctioned for those incidents and never had an opportunity to explain them to BOP (one involved her being delayed in returning home from school because of car trouble and the other took place during a time period when her ankle monitor was malfunctioning). Prior to these incident reports, Ms. Tompkins had received no incident reports for almost a year on home confinement.

b. Positive Drug or Alcohol Tests Should Not Trigger Re-Imprisonment Where an Individual Presents No Specific Danger to the Community

In other instances, BOP has re-imprisoned people who are working, caring for their families, and otherwise succeeding on home confinement based on allegations of a single positive drug or alcohol test. There is no indication that BOP is considering the specific circumstances of individuals' lives, including their health conditions and the ways in which they are supporting their families and communities, before taking this drastic and disproportionate action.

Virginia Lallave, Eva Cardoza, and Sherita Nicks, all mothers of young children, were ripped away from their families based on allegations of marijuana or alcohol use. (Notably, although a violation of home confinement rules, marijuana and alcohol use is legal for adults over the age of 21 in New York State, where all three women resided.) For each of these women, the incident was the first allegation of misconduct during their entire time on home confinement. None had the chance to explain to a BOP decisionmaker the ways in which they were succeeding at reintegrating into their communities and how they and their families would be harmed by re-imprisonment. None of these mothers present any danger to the community. To the contrary, removing them from their homes and caretaking responsibilities placed their families at significant risk.

1. Virginia Lallave's story

Ms. Lallave is a 35-year-old mother who spent a year and a half on home confinement in New York City with no incident reports. In addition to working full time in construction and maintenance, she cares for her children (including her baby) and her ailing father, whom she takes to dialysis appointments and assists with his medical equipment needs. Despite Ms. Lallave's clear success on home confinement, BOP took her away from her 10-month-old baby and other family members and re-imprisoned her in February 2022 based on allegations of a single positive marijuana test. Initially, after informing her of the positive test, halfway house staff confined Ms. Lallave to a room at the halfway house for a week. Despite assurances from halfway house staff that she would not be re-imprisoned, U.S. Marshals picked her up and brought her to MDC Brooklyn. Ms. Lallave was not permitted to bring along proof of vaccination, and was placed in the Special Housing Unit, which was being used as the quarantine area for unvaccinated individuals. After Ms. Lallave's counsel filed a habeas petition asserting BOP detained her in violation of her due process rights, the district court acted within hours of the filing and granted provisional release pending the resolution of the case.²² Although BOP subsequently agreed not to try to re-imprison Ms. Lallave for the positive test, the agency made no commitment to change its practices with respect to home confinement revocation. Ms. Lallave and her family continue to live in fear of BOP removing her from her home again.

²² Order, *Lallave v. Martinez*, No. 22-CV-791 (NGG) (E.D.N.Y., Feb. 11, 2022).

2. Eva Cardoza's story

Eva Cardoza is a 45-year-old mother who spent a year on home confinement in Orange County, New York without receiving an incident report.²³ During that time, she cared for her daughter, three young stepchildren, ill fiancé (who has coronary artery disease, a heart attack history, and other serious health problems), and her diabetic mother. Ms. Cardoza has a history of sexual and physical abuse, PTSD, anxiety, depression, and stress-induced seizures. She was succeeding on home confinement, addressing her health issues, and providing crucial care for her family. Nevertheless, BOP re-imprisoned her in June 2021 based on a single positive test for marijuana. Shortly after BOP sent Ms. Cardoza back to prison, her 14-year-old daughter was the victim of sexual assault. For the past year, while Ms. Cardoza has been imprisoned, her daughter has been suffering through trauma from the attack—including testifying at the trial and sentencing of her assailant—without her mother by her side. In reflecting on the impact of not having her mother around to soothe her through this extraordinary trauma, Ms. Cardoza's daughter said “[i]t really stresses me out because I cry at night. . . . I always want to walk into my stepdad's room, hoping that my mom's there. But she's never there[.] . . . She would give me that comfort and that mother hug that every child would want . . .”²⁴

Meanwhile, Ms. Cardoza's fiancé's health has deteriorated, and he has had to put off necessary surgeries because he cannot leave the young children alone. Ms. Cardoza's imprisonment and separation from her family has worsened her seizures and caused her anxiety to spike unbearably. The suffering of this family has been excruciating. Ms. Cardoza's projected release date from BOP custody is December 2024, and she has already spent more than a year back in prison solely because of this single positive test.

3. Sherita Nicks's story

Ms. Nicks is a 48-year-old mother who was released on home confinement in December 2020. While on home confinement, Ms. Nicks worked to re-establish strong personal and community ties. She became central to the everyday lives of her mother, sister, seven-year-old niece, and six-year-old daughter, and home-schooled both girls when schools shut down due to COVID and her sister was at work as a certified nursing assistant. While home, Ms. Nicks also enrolled in the TDAT drug treatment program, having completed the intensive nine-month RDAP program in prison, and she was anticipating earning a year off her sentence in the near future as a result of her success in this program. The BOP nevertheless separated Ms. Nicks from her family in May 2021 based on a single set of readings on a breathalyzer test at well below the legal intoxication limit. Ms. Nicks's daughter, now 7, was only 10 months old when her mother first went to prison. Ms. Nicks had been in regular contact with her daughter throughout her initial incarceration, but home confinement allowed mother and daughter to cultivate a special, profoundly different in-person bond. When BOP re-imprisoned Ms. Nicks without notice, she

²³ Petition, *Cardoza v. Pullen*, No. 22-CV-591 (SVN) (D. Conn. April 25, 2022) (Dkt. 1).

²⁴ Tiffany Cusaac-Smith, *They were Released From Prison Because of COVID. Their Freedom Didn't Last Long*, USA Today (July 20, 2022), <https://news.yahoo.com/were-released-prison-because-covid-095909983.html>.

was not allowed a chance to see her daughter, who had no idea why her mother was home one day and then gone the next. Ms. Nicks and her daughter have been devastated by the separation. BOP's re-imprisonment of Ms. Nicks also prevented her from starting a job she had just obtained in a women's shelter. Moreover, after BOP returned Ms. Nicks to prison, staff told her that all of her progress in RDAP had been erased and she would have to restart the program from the beginning (which they have not yet allowed her to do, despite her requests). Ms. Nicks's projected release date from BOP custody is not until December 2025. She has already spent more than a year back in prison solely as a result of this incident.

These stories and others like them demonstrate the need for careful constraints and proportionality when considering what violations will trigger re-imprisonment. These stories also illustrate the consequences of a lack of established procedure for revocation proceedings.

II. The Absence Of Established Procedure For Revoking Home Confinement Leads To Chaos, Confusion, And The Denial Of Due Process For Individuals Accused Of Violations While On Community Confinement.

Although Attorney General Garland's statements to the public assured that processes would be in place to support those on home confinement, the rulemaking at issue here fails to live up to that promise. And without clear rules, confusion and chaos ensues. BOP has not been transparent about who within the agency is responsible for re-imprisonment decisions, what criteria they are using to make these decisions, and what evidence they are relying upon.²⁵ Email correspondence obtained through Freedom of Information Act requests indicates that some re-imprisonment decisions are being made by a manager at BOP's New York Residential Reentry Management (RRM) field office based on conclusory emails from halfway house directors sent before halfway house staff even spoke to individuals about the allegations against them.²⁶

What is more, Assistant United States Attorneys have taken the position in litigation that no procedural protections are, nor need be, afforded to people on home confinement who are facing re-imprisonment. The lack of clear rules, coupled with DOJ's litigation position, encroaches on individuals' constitutional rights, deprives them of dignity, and saddles them with immense confusion and stress. This is not justice. People "who in the interests of justice should

²⁵ At oral argument in Ms. Tompkins' case on June 29, 2022, government counsel asserted that BOP had no internal memoranda governing its revocation decisionmaking. Government counsel confirmed that the re-imprisonment decision in Ms. Tompkins' case was made by the Residential Reentry Manager at the New York RRM, but it was unclear what information he considered or criteria he used to make the decision.

²⁶ See Pet. Opp. to Mot. to Dismiss, Ex. 1, *Tompkins v. Pullen*, No. 22-CV-391 (OAW) (D. Conn. April 22, 2022) (Dkt. 15-1); Pet., Ex. C, *Cardoza v. Pullen*, No. 22-CV-591 (SVN) (D. Conn. April 25, 2022) (Dkt. 1-4).

be given an opportunity to continue transitioning back to society”²⁷ are being unnecessarily returned to prison.

a. DOJ Attorneys Argue In Court That No Process Is Due To People Being Re-Imprisoned

Despite U.S. Supreme Court cases clearly establishing the due process rights of people in community programs facing re-imprisonment,²⁸ DOJ lawyers are asserting in court that individuals on home confinement have no right to procedural protections before they are re-imprisoned and that BOP need not provide any justification for its re-imprisonment decisions. For example, in responding to a habeas petition filed by Ms. Tompkins, the government asserted: “As to her redesignation from Home Confinement to FCI Danbury, Petitioner has no protected liberty interest and was owed no due process; Petitioner’s place of confinement is a matter reserved to the BOP.”²⁹ Similarly, in responding to Ms. Cardoza’s habeas petition, the government claimed that individuals on home confinement have no liberty interest in remaining there, stating that “since federal law is clear that is [sic] the BOP that determines where the petitioner will serve her ongoing federal sentence, there are no procedural due process protections associated with BOP’s decision in that regard.”³⁰

None of the individuals discussed above had the opportunity for a hearing in front of the BOP official making the re-imprisonment decision. They were unable to address the allegations against them and explain why, even if misconduct were established, re-imprisonment was unwarranted given their success in the community and the harm that would result from them being torn away from their families and jobs. *See Morrissey*, 408 U.S. at 488 (stating that an individual “must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation”). Such hearings, required by the Due Process Clause, would help BOP better understand the consequences of its decisions. And the information provided at these hearings

²⁷ Statement by Attorney General Merrick B. Garland, Press Release No. 21-1283 (Dec. 21, 2021), <https://www.justice.gov/opa/pr/statement-attorney-general-merrick-b-garland-0>.

²⁸ *See Morrissey v. Brewer*, 408 U.S. 471 (1972) (setting forth procedures required by the Due Process Clause before parole can be revoked); *Young v. Harper*, 520 U.S. 143 (1997) (holding that preparole conditional supervision program, where individual lived at home and worked while in the custody of the Oklahoma Department of Corrections, was sufficiently similar to parole to require same due process protections); *Gagnon v. Scarpelli*, 411 U.S. 778, 791 (1973) (setting forth requirement of appointment of counsel in some instances where individuals face probation or parole revocation). For additional analysis, *see* Comment to Proposed Rule, filed by the American Civil Liberties Union, et al. at 4-8.

²⁹ Resp. Reply at 8, *Tompkins v. Pullen*, No. 22-CV-391 (OAW) (D. Conn. May 6, 2022) (Dkt. 21).

³⁰ Resp. Memo in Supp. of Mot. to Dismiss at 11, *Cardoza v. Pullen*, No. 22-CV-591 (SVN) (D. Conn. May 17, 2022) (Dkt. 12-1).

would assist the agency in making better decisions about who the agency actually needs to expend resources on re-imprisoning to protect public safety and who should remain under supervision in the community.

b. Lawyers Play A Critical Role In Protecting The Constitutional Rights Of People Accused Of Violating The Conditions Of Home Confinement

Assistance from lawyers can be critical to helping people dispute or explain the allegations of misconduct against them and the reasons they should not be re-imprisoned. Help from lawyers can be particularly important where individuals suffer from anxiety, PTSD, or other medical conditions that impair their ability to advocate for themselves in stressful situations.³¹ Advocacy from lawyers, the involvement of courts, and public attention helped to secure the release of Ms. Levi, Mr. Martinovich, and Ms. Lallave. But countless other individuals have not been able to access counsel or the courts after re-imprisonment.

Even when a person has a retained lawyer, BOP has specifically denied attorneys the right to be present when clients are questioned about misconduct by halfway house staff.³² And attorneys and their clients have been denied the ability to advocate before BOP officials making the re-imprisonment decisions.

1. Amanda Cooper's story

Counsel can play a crucial role in ensuring that BOP's actions are based on a correct understanding of the facts. For example, after her release on home confinement in July 2020, Amanda Cooper had no incident reports and an exemplary work record as a human relations coordinator for a cleaning company. Ms. Cooper, age 44, suffers from uncontrolled diabetes, blood clotting disorder, hypertension, seizures, liver disease, and kidney disease, among other ailments, and obtains treatment from a variety of specialists in the community. In October 2021, Ms. Cooper received an incident report based on a positive urine test for ethanol. Counsel submitted to BOP Ms. Cooper's medical records, a letter from an expert, and various studies to show that false positives can result where an individual has excess glucose in their urine, which occurs with uncontrolled diabetes. The glucose can ferment, particularly when samples are shipped and there is a delay in testing—as occurred with respect to Ms. Cooper's urine sample. Although BOP ultimately expunged the incident report, Ms. Cooper suffered multiple weeks of extreme stress while waiting for this matter to be resolved. Most individuals accused of misconduct are not able to marshal the kind of response that counsel can provide, particularly within the very short time frame typically available before BOP makes a re-imprisonment decision.

³¹ Access to counsel is governed not only by the Due Process Clause but also by the Rehabilitation Act of 1973. *See Gagnon*, 411 U.S. at 790–91; 29 U.S.C. § 794(a).

³² Despite a specific request, BOP would not let counsel be present when halfway house staff questioned Gwendolyn Levi, Virginia Lallave, or Amanda Cooper, discussed *supra*, regarding allegations of misconduct.

The BOP should establish rules permitting retained counsel to participate in all stages of the revocation process and provide for the appointment of counsel for indigent people facing return to a correctional facility who do not have attorneys.

III. Conclusion

FAMM and Professor Sarah Russell appreciate the opportunity to comment and provide real life stories that illustrate what is at stake for individuals on home confinement. We would be happy to provide further information, if requested. If you have any questions or would like to discuss the information in this comment, please contact Shanna Rifkin, Deputy General Counsel at FAMM, 312-519-8558, srifkin@famm.org or Sarah F. Russell, 203-582-5258, sarah.russell@quinnipiac.edu.

Respectfully submitted,

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