

Testimony of Rebecca Shepard
Assistant Federal Public Defender
Federal Public Defender for the Northern District of Georgia
Before the Homeland Security and Governmental Affairs Committee
(HSGAC) Permanent Subcommittee on Investigations (PSI)

Hearing on
“Corruption, Abuse, and Misconduct at U.S. Penitentiary Atlanta”

Chairman Ossoff, Ranking Member Johnson, and Members of the Subcommittee:

Thank you for holding this hearing and for the opportunity to testify. My name is Rebecca Shepard. I am a trial attorney with the Federal Defender Program, Inc. of the Northern District of Georgia, a federal community defender office based in Atlanta. At any given time, Federal Public and Community Defenders and other appointed counsel under the Criminal Justice Act represent 80 to 90 percent of all federal defendants because they are unable to afford counsel. An overwhelming majority of people held in federal pretrial detention—whether in the custody of BOP or the United States Marshals Service (USMS)—are our clients.

I. Introduction

Today, I will focus my testimony on the unacceptable conditions of confinement for clients who are detained pretrial—awaiting trial and presumed innocent—at the U.S. Penitentiary (USP) Atlanta. My clients, like every other person held in federal detention, are parents, children, siblings, and friends. Each deserves to be treated with basic human dignity. Each deserves adequate access to counsel to assist with difficult decisions like whether to plead guilty or go to trial. But USP Atlanta is not meeting these basic standards. Its failures have harmed our clients, impeded our ability to adequately represent our clients, and delayed the resolution of their cases.

The problems at USP Atlanta are part of a larger story about why strong oversight of the BOP and USMS is so desperately needed. Conditions like these are replicated at BOP pretrial detention facilities and local jails under contract with the USMS throughout the United States. But for too long, and regardless of who holds political power, DOJ, BOP, and the USMS have ignored congressional oversight, the courts, independent auditors, and whistleblowers calling them to account for these deficits. This lack of accountability has gotten progressively worse, culminating with Director Carvajal’s refusal to appear before this body for testimony absent

congressional subpoena.¹ I am grateful to speak to you today about the urgent need for change.

II. The Role of Federal Public Defenders

The Sixth Amendment to the Constitution guarantees individuals accused of crimes the assistance of counsel.² Federal public defenders, along with counsel appointed under the Criminal Justice Act (CJA), serve this imperative through the zealous representation of individuals charged with federal crimes who cannot afford counsel. Our representation may include bond hearings, preliminary hearings, filing and briefing pretrial motions such as motions to suppress, evidentiary hearings, plea negotiations, plea hearings, trial, and sentencing hearings. If our clients are convicted, we represent them on appeal. If our clients elect to cooperate with law enforcement by providing evidence to assist an investigation or even acting in an undercover capacity, we represent them in that process as well.

To provide effective assistance, defenders must work closely with our clients to investigate and assess the strength of the government's case, and to counsel clients through difficult decisions such as whether to plead guilty, go to trial, or file an appeal. Building a strong relationship of trust with our clients is essential to our work.

III. USP Atlanta

USP Atlanta operates a pretrial detention facility where many clients in our district are housed. Accordingly, we have unique insight into the facility. To appreciate the urgent nature of the crisis at USP Atlanta, and other BOP and USMS facilities, it is essential to start with a clear picture of what life inside is like.

A. Inhumane and unsafe conditions.

Pretrial clients detained at USP Atlanta have not been convicted of a crime and are entitled to the presumption of innocence. But they are subject to deplorable and punitive conditions that have persisted for many years:

Conditions of confinement. For decades, clients detained at USP Atlanta have been subject to extensive "lock downs," during which they are confined to their cell almost completely. Twenty years ago, the Eleventh Circuit considered a case where

¹ Mike Balsamo & Michael Sisak, *Senate Panel Subpoenas Federal Prisons Director to Testify*, Wash. Post (Jul. 18, 2022), https://www.washingtonpost.com/politics/senate-panel-subpoenas-federal-prisons-director-to-testify/2022/07/18/c30d5cca-06db-11ed-80b6-43f2bfcc6662_story.html.

² U.S. Const. amend VI.

a client “spent six years in presentence confinement, of which five years were spent in USP Atlanta in 23-hour-a-day lockdown. He testified that he had not been outside in five years.”³ Despite the Eleventh Circuit’s recognition of the “extraordinary” nature of these conditions, they persist. In 2016, a judge in my district described such conditions as “excruciating,” and acknowledged that to be “put into segregation simply by virtue” of getting placed at USP Atlanta, “not because of something else you did ... makes it all the more so.”⁴ That judge recognized that “those are not the normal conditions for most pretrial detainees.”⁵

While locked down, clients cannot access anything other than a sink and toilet: there are no showers, no phone calls, no law library, no access to the chaplain, and no commissary. Over the eight years I have been a defender in Atlanta, I have seen clients routinely locked down and allowed out of their cells for only (1) 15-30 minutes, 3 times a week; (2) 1 hour, 3 times a week, or (3) 1 hour each day. These extensive lock down periods have often persisted for months—for example, in 2014-2015 our clients were only allowed out of their cells for 1 hour, 3 times per week, for more than 11 months.

The brief periods our clients are released from their cells do not permit them to regularly shower, speak to their families and lawyers, or review materials related to their case.⁶ One of our clients was held on an overcrowded pod (unit) with approximately 100 other people. Due to overcrowding, the pod had three people in two-person cells. For many days in June and July, in the heat of the Atlanta summer, his pod had no air conditioning or airflow. The pod had only six showers and three phones, making it impossible for everyone to shower and make phone calls when released, resulting in long lines and abbreviated times for the actual call. Our client was routinely forced to choose between calling his family or his attorney; he could not do both. (Often, calling an attorney is not even an option, because our clients are released after business hours.)

³ *United States v. Pressley*, 345 F. 3d 1205 (11th Cir. 2003).

⁴ See Ex. A, Redacted Transcript. Note that I have redacted this transcript to protect the privacy of my client.

⁵ *Id.*

⁶ See Exhibit B & C, Redacted Affidavits. Note that I have redacted these affidavits to protect the privacy of our clients.

Even worse, our client's cell and pod were infested with roaches, and the facility provided no supplies to clean the cells in order to prevent vermin. When our client asked for cleaning supplies, the guards laughed at him.

The conditions this client encountered were not exceptional: they represent the norm for individuals held pretrial at USP Atlanta. The cruel but routine choices my clients must confront about whether to shower, speak to a loved one or lawyer, or study their legal case, before returning to a cramped, infested, and often too-hot cell, are inhumane and unjust.

Nutrition and Hygiene. Clients at USP Atlanta also experience substandard food and hygiene conditions including:

- Inadequate access to clean water for bathing and drinking. Our clients experienced several weeks where they were told not to drink the water because of “problems with the pipes,” or to even use water from the taps to brush teeth or bathe. Clients were given conflicting reasons for the prohibition, including “arsenic in the pipes” and “mold.” My office never got a clear answer. During these periods, clients were not provided with sufficient water for drinking, let alone enough to use for basic hygiene.
- Months without any hot meals, during which clients are provided only sack lunches for every meal. Clients reported that dinners of only a sandwich were routine, and one observed that the packages of sandwich meat indicated dates long-past expiration.
- Weight loss and emaciation due to poor nutrition.
- Limited commissary, sometimes including only instant coffee and chips. My client showed me the commissary list they actually receive, and it is very different from what is advertised on USP Atlanta's public website. (While this might seem a small matter, due to the limited meals provided, my clients depend significantly on commissary to supplement their diets.)
- Roaches or bugs in food.
- Access to showers only three times per week—but due to limited time out of cell, clients often cannot shower even that frequently.
- Change of clothes not available for several weeks—at best, change of clothes only available a maximum of three times per week. Several clients reported that they were provided with only one set of underclothes that they were

expected to wear those for two to three weeks at a time, with no alternative provided.

- Limited access to toothbrushes and toothpaste.

Lack of access to mental health treatment. Pretrial detainees are routinely denied mental health treatment at USP Atlanta, including lack of access to medication, therapy, and mental health professionals. Moreover, when attorneys hire outside experts to conduct mental health evaluations of our clients, USP Atlanta staff is so unresponsive and disorganized that the facility causes delay and has even prevented the doctors' access to the clients.

We have had clients who have been sent to other facilities in BOP to be evaluated for their competency to stand trial. In some of those cases, BOP doctors at the other facilities deemed that the clients could be restored to competency with medication. But when our clients were returned to USP Atlanta, the staff fail to provide them with the prescribed medication regime, causing our clients to decompensate and become, again, incompetent to stand trial.

Recently, a client reported being held for a week on suicide watch, without any access to mental health treatment and medication. He reported that he was only provided a paper jumpsuit and paper blankets.

Facility in disrepair. The state of USP Atlanta is obvious to any observer: there is inadequate heating and cooling in the building, and there are leaks and water damage that have existed, unrepaired, for years. As mentioned above, bugs and rats infest the buildings. At one point there were multiple dead roaches in the attorney meeting rooms that remained in place over the course of several months

B. Inadequate access to counsel.

The Sixth Amendment requires not just that defense counsel be appointed, but that counsel provide effective assistance.⁷ Individuals are denied their right to effective assistance of counsel when, for example, "counsel is called upon to render assistance under circumstances where competent counsel very likely could not."⁸ The inevitable result of inadequate access to counsel is ineffective representation, and in some cases, wrongful conviction. This leads not only to obvious human costs, but

⁷ *United States v. Cronin*, 466 U.S. 648 (1984).

⁸ *Bell v. Cone*, 535 U.S. 685, 696 (2002); *see also* *United States v. Morris*, 470 F.3d 596, 601-02 (6th Cir. 2006) (finding ineffective assistance of counsel where defense counsel lacked the opportunity to speak with the client privately, lacked full discovery, and lacked the time to investigate the case and to adequately assess a plea offer before its expiration).

also to unnecessary fiscal costs from prolonged or unjust incarceration and collateral adjudications to correct errors.

USP Atlanta's policies and practices (which do not always conform to written policy) do not allow us to communicate with our client as needed to fulfill our constitutional and ethical obligations of zealous advocacy. Some examples follow:

Scheduling delays and difficulties. USP Atlanta requires attorneys to schedule legal visits in advance and for visit requests to be approved by staff. On its face, that is not a significant obstacle. However, USP Atlanta staff members consistently fail to respond to requests for legal meetings, often for several days and despite the requests being repeatedly resent. It is not unusual for the date of the requested meeting to pass and still have no response from the prison staff.

Moreover, USP Atlanta changes its scheduling policies frequently and without prior notice to clients or their lawyers. Currently, legal visits are allowed only two days per week, between 8:00 a.m. and 3:00 p.m. This is the third iteration of a visitation schedule in this calendar year. With each change in policy, USP has exacerbated scheduling difficulties by *reducing* the days available for legal visits.

Clearing the hurdle of getting a meeting approved and scheduled does not assure it will occur because of the chaos and disorganization of the facility. For example, it is common that staff at the visitor entry gate (1) do not know the facility's policy for legal visits; (2) do not have any record of the confirmed, scheduled visit; (3) cannot summon a staff member to transport the attorney or the client to the meeting room; and (4) cannot timely process visitors. The staff we encounter at USP Atlanta frequently appear untrained and uninformed about the facility's policies and procedures. Attorneys often wait for more than an hour after arriving at the designated time for staff to process them into the building due to confusion and disorganization among the staff.

Recently, a colleague with a prescheduled legal visit arrived at the entry door to USP Atlanta to find it locked. She knocked for two hours, but no staff member ever responded. Her attempts to call and email the facility from outside the building went unanswered. Later, after finally giving up and returning to the office, she received a call from the staff member who had scheduled the visit asking why she failed to show up—when she had been outside of the building trying to contact anyone inside the prison for hours.

In short, Defenders comply with USP Atlanta's shifting protocols for legal visits, but in our experience, the facility staff does not. In addition to interfering with

attorney-client communication and our clients' Sixth Amendment right to effective assistance of counsel, USP Atlanta's disorganization and failure to adhere to its own policies is expensive. When appointed counsel retains a professional expert or interpreter to visit a client, taxpayers bear the burden of paying the hourly rates for these professionals during the delays caused by USP Atlanta staff.

Conditions of legal meetings. USP Atlanta also fails to provide meeting rooms that both allow for confidential attorney-client communication and allow adequate monitoring for safety. USP Atlanta has legal meeting rooms that are private and monitored, but it will not use that space for our pretrial clients. Instead, the facility requires defenders to either meet with our clients in the same room as a staff member, which violates our duty to ensure confidentiality, or meet with clients in a room that is out of sight of any staff members.

Legal calls and video visits. Prior to the COVID-19 pandemic, we could not conduct video visits with clients at USP Atlanta. Although there was no clear policy on legal calls, we could arrange legal calls if the client's case manager was amenable. Under current policy, the facility will allow legal video visits up to one hour and legal calls up to 30 minutes. But these calls are held in a counselor's office and lack confidentiality, so they do not provide the opportunity to discuss sensitive or privileged matters. And the scheduling process is the same as for in-person meetings, so there are frequently delays and difficulties scheduling, just as there are for in-person meetings.

Access to discovery. "Discovery" refers to the evidence against a client that the government produces to the client and her lawyers. Defenders carefully review this evidence with our clients in order to investigate and assess the strength of the government's case, identify any constitutional defects that could be the subject of pretrial motions, and determine the best resolution for the case. Delays in clients receiving and reviewing discovery cause delays in resolving the case. This is harmful to our clients because it extends the time they are held in pretrial detention. It is also burdensome to the entire court system because it can result in unfair or unjust outcomes, requiring later adjudication, or impede the expeditious resolution of cases.

Nearly all federal cases involve electronic discovery, such as video or audio recordings, the contents of cell phones, extensive records or documents, and other items that cannot be produced on paper. While it is often difficult for clients in pretrial detention to access electronic discovery because of limited computer availability, USP Atlanta compounds difficulties through two policies: detainees are

not provided sufficient access to the law library to review electronic discovery, and attorneys are not permitted to review electronic discovery with clients.

USP Atlanta does not allow pretrial detainees sufficient access to the law library to adequately review their electronic discovery. As detailed above, our clients are frequently “locked down” and not allowed to exit their cells. When they are released from their cells, they must use that time to perform myriad tasks: shower, get commissary, make calls to their family members and friends, make calls to their attorneys, or visit the law library. This is simply not enough time to meaningfully review discovery in a complex federal case. For example, in recent years there have been months-long periods where detainees are only released from their cell for 30 minutes or an hour, three times a week. Clients reported having to decide whether to wait in line to make a phone call home or wait in line to take a shower—both addressing their basic hygiene needs and reviewing the evidence in their case was impossible.

USP Atlanta also does not allow attorneys to bring electronic devices or computers into the facility for legal meetings, so we cannot review electronic discovery with our clients. In one recent case, the client’s lack of access to the discovery was causing delay and prohibiting him from preparing for trial. His defender asked the district court to enter an order directing the warden and staff of USP Atlanta to allow him access to the prison law library before and during trial. The court agreed and entered the order. However, the prison staff refused to carry out the judge’s order, and the client was not allowed to access the library as the court ordered. The client reported that he was told by USP Atlanta staff that the judge was not in charge of what happened in the jail. Even when defenders seek remedies from the court and our requests are granted, it offers little relief.

C. Unjust outcomes.

The pretrial conditions at USP Atlanta have repercussions beyond the hardships experienced by detained clients. The barriers to effective attorney-client communication consistently result in delays in resolving cases and unduly extend the periods our clients are subjected to egregious pretrial conditions. Defenders are forced to seek continuances—often repeatedly—because we cannot comply with court deadlines when we cannot communicate with our clients. These delays burden the court system.

Notably, probation officers in our district face the same obstacles to communicating with USP Atlanta and cannot timely schedule presentence interviews with detained clients because staff do not respond to their requests. Presentence interviews are a

necessary step before sentencing, and when the interview cannot be conducted, the sentencing hearing is delayed.

In some cases, judges have attempted to facilitate attorney or probation officer meetings with clients detained at USP Atlanta by ordering USMS to transport the client to the courthouse. This is a work-around to avoid additional delay in resolving a case—but it burdens USMS and court resources and is not a solution to the problems caused by the mismanagement at USP Atlanta.

The conditions at USP Atlanta are avoidable and should not be the norm. There are other non-BOP pretrial detention facilities in our district, where clients can reasonably communicate and meet with counsel, are able to access their discovery and participate in their defense, and are not subject to such egregious conditions. For example, some of our clients are held at Robert A. Deyton Detention Facility (“RADDF”). There, our clients are permitted to walk around freely in their pod and spend time outside in the yard each day. They can shower daily and access phones for calls to family and counsel. The facilities are not infested with vermin, and clients are given supplies to keep their cells clean.

IV. Systemic Dysfunction in Federal Detention

While it is beyond the scope of my testimony to offer a complete account of the poor conditions of confinement and limited access to counsel that characterize many other sites of federal pretrial detention across the country, I will offer examples from two very distinct places—New York and Kansas—to illustrate the conditions defenders regularly witness at detention facilities run by BOP or contracted by the USMS.

A. Metropolitan Detention Center (MDC), New York.

MDC Brooklyn is the largest federal pretrial detention center in the United States and houses approximately 1600 people, most of whom are awaiting trial in the Southern and Eastern Districts of New York. The facility has been the repeated subject of scathing reports by DOJ Office of Inspector General (OIG) on topics ranging from poor facilities management, sexual abuse of detained individuals by officers, and failures of management of the Special Housing Unit.⁹ There have been high-profile, systemic failures at the facility, such as a week-long blackout in

⁹ See, e.g., DOJ OIG, *Review and Inspection of Metropolitan Detention Center Brooklyn Facilities Issues and Related Impacts on Inmates, Evaluation and Inspections Report* (Sept. 2019); DOJ OIG, *Management of the Special Programs Unit at the Federal Bureau of Prisons Metropolitan Detention Center in Brooklyn, New York*, Evaluation and Inspection Division, 15-08 (September 2015).

the dead of the New York winter in January 2019, which left detainees in the dark, freezing cold, with no legal or family access.¹⁰ The facility has a long history of interference with legal access to clients, and the Federal Defenders of New York have had a Sixth Amendment lawsuit pending against the facility since February of 2019.¹¹

Despite years of dysfunction and scrutiny by auditors, Congress, and the courts, the situation at MDC remains dire, and has been exacerbated by the recent closure of the only other federal pretrial facility in New York. Since the closure, corruption at MDC has substantially increased, with officers bringing in weapons, cellphones, and drugs. In the past two years, four people in custody at MDC have died by suicide, with two suicide deaths since the closure. Medical care has faltered even further, leading judges to have to intervene to obtain even the most basic care for people who are detained. Issues with legal access persist, and have worsened, despite two years of court mediation between BOP and the Federal Defenders of New York.

B. USP Leavenworth, Kansas.

Until recently, clients of the Federal Defender for the District of Kansas were held pretrial at a USMS-contracted private facility, CoreCivic Leavenworth. The facility was dangerously understaffed, poorly managed, and incapable of safely housing the people detained there. Basic human needs were not met, food was restricted, contact with legal counsel and family was denied or curtailed,¹² medical care was limited, and showers were infrequent because the facility was too unsafe.¹³ Last

¹⁰ *Hearing on the Fed. Bureau of Prisons and Implementation of the First Step Act Before the Comm. on the Judiciary of the H. Subcomm. on Crime, Terrorism, and Homeland Sec.*, 116th Cong. (Statement of David Patton at 5), (Oct. 17, 2019), <https://bit.ly/3kfSAJF> pdf

¹¹ *Federal Defenders of NY v. Federal Bureau of Prisons*, 19cv 660 (MKB) (EDNY).

¹² CoreCivic Leavenworth was also embroiled in litigation surrounding the confidentiality of attorney client communications after it was discovered that the facility was recording attorney-client communications, and then routinely providing those recordings to federal prosecutors. See Chris Haxel, *Prosecutors Held in Contempt Over Leavenworth Tappings, Judge Will Hear Prisoners' Appeal*, NPR in Kansas City (Aug. 14, 2019), <https://www.kcur.org/news/2019-08-14/prosecutors-held-in-contempt-over-leavenworth-tappings-judge-will-hear-prisoners-appeals#stream/0>; Dan Margolies, *Leavenworth Inmates Reach \$1.45 Million Settlement Over Taped Attorney-Client Phone Calls*, NPR in Kansas City (Aug. 26, 2019), <https://www.kcur.org/news/2019-08-26/leavenworth-inmates-reach-1-45-million-settlement-over-taped-attorney-client-phone-calls>.

¹³ See ACLU Kansas, *ACLU, Public Defenders Urge White House to Shut Down Violent Private Corrections Facility in Kansas* (Sept. 4, 2021), <https://www.aclukansas.org/en/news/aclu-public-defenders-urge-white-house-shut-down-violent-private-corrections-facility-kansas>.

year, the facility was closed by executive order, and pretrial clients were transferred to a BOP facility, USP Leavenworth.

Unfortunately, poor conditions of confinement and insufficient access to counsel persists for people now detained pretrial at USP Leavenworth. There, people have been locked down 20 to 22 hours a day, and the facility continues to fail to provide timely and confidential attorney-client access. Clients' requests to place calls to attorneys are routinely unfulfilled, and legal mail is inexplicably returned or delivered to clients after it has been opened outside their presence.

Because of these issues, the federal public defenders in Kansas and Western District of Missouri have concluded that shifting people from CoreCivic to an unprepared and unresponsive BOP facility was, in many ways, a lateral move.

V. Policy Solutions

If past predicts future, there is good reason to believe that the conditions I have described today will persist absent aggressive action by Congress and the Department of Justice. There are several steps Congress could take to intervene and improve the currently inhumane conditions:

Strengthen congressional oversight of federal detention. I commend this committee for prioritizing BOP oversight at a time when, as Senator Ossoff has recognized, "America's prisons and jails are horrifically dysfunctional and too often places where brutality and criminality are prevalent."¹⁴ I am also encouraged by Senators Ossoff and Braun's recent launch of the Senate Prison Policy Working Group, and stand ready to assist in its efforts to "improve the safety and well-being of incarcerated people and staff, reduce recidivism rates, and promote transparency within the prison system."¹⁵

To address the issues I have detailed today, I encourage the Committee to expand its oversight efforts to include DOJ and the USMS, two entities that bear significant responsibility for the systemic defects I have summarized. The USMS, in particular, is responsible for the majority of individuals in federal pretrial custody,¹⁶

¹⁴ Press Release, Jon Ossoff, U.S. Senator for Georgia, Sens. Ossoff, Braun Launch Bipartisan Working Group to Examine U.S. Prison Conditions, Promote Transparency (Feb. 17, 2022), <https://www.ossoff.senate.gov/press-releases/sens-ossoff-braun-launch-bipartisan-working-group-to-examine-u-s-prison-conditions-promote-transparency/>.

¹⁵ *Id.*

¹⁶ The USMS does not own or maintain its own detention facilities, but instead houses those in its custody in state and local detention facilities pursuant to Intergovernmental Agreements (IGAs), or in private jails pursuant to contracts. Most people in federal pretrial detention are held in facilities

but it is rarely held to account for egregious conditions of confinement in its contract facilities.¹⁷

Congress should also establish an independent body to provide regular oversight of the BOP and USMS. “Independent oversight is essential to preventing problems before they occur, but also can be useful to provide accountability when things go wrong.”¹⁸ Independent auditors can “conduct inspections on demand, speak confidentially to prisoners and staff, and respond to inquiries from families with incarcerated loved ones.”¹⁹

End the federal pretrial detention crisis. The root cause of many of the problems that I have described today is the extraordinarily high rate of federal pretrial detention. The dramatic increase in pretrial detention rates over the past 40 years has transformed the federal system into one that U.S. Probation and Pretrial has characterized as “more oriented towards pretrial detention than release.”²⁰ Criminologists have concluded that the rising detention rate “cannot be explained by the changing risk profile” of individuals charged with federal offenses, “but rather by changes in how the system regard[s] pretrial release and those entitled to it.”²¹

This orientation towards detention is not necessary to protect community safety or prevent non-appearance. Nearly everyone released before trial appears in court and very few are arrested for new crimes while on pretrial release. In 2019, 99% of people released appeared for court, and more than 98% had no arrests for new

contracted by USMS: During FY 2021, the average daily federal detention population was 63,679 people; of that number, 46,866 were held in state and local facilities. See U.S. Marshals Service, *Fact Sheet: Facts and Figures, 2022*, <https://www.usmarshals.gov/duties/factsheets/facts.pdf>.

¹⁷ See Seth Freed Wessler, *Inside the US Marshals’ Secretive, Deadly Detention Empire*, Mother Jones (Dec. 2019), <https://www.motherjones.com/crime-justice/2019/10/inside-the-us-marshals-secretive-deadly-detention-empire/> (detailing inhumane conditions of confinement and failures in USMS audit practices).

¹⁸ *Hearing on Oversight of the Federal Bureau of Prisons Before the S. Comm. on the Judiciary*, 117th Cong. (Statement of Kevin Ring at 7), (Apr. 14, 2021), <https://famm.org/wp-content/uploads/FAMM-Statement-on-BOP-Oversight-Hearing-4.15.pdf>

¹⁹ *Id.*

²⁰ See Thomas H. Cohen & Amaryllis Austin, *Examining Federal Pretrial Release Trends over the Last Decade*, 82 Fed. Probation 2 at 10 (2018).

²¹ *Id.* at 4 (citing James Byrne & Jacob Stowell, *The Impact of the Federal Pretrial Services Act of 1982 on the Release, Supervision, and Detention of Pretrial Defendants*, 71 Fed. Probation 2 (2007)).

crimes on release.²² These numbers hold steady for the federal districts with the highest release rates in the country.²³ Despite this evidence, prosecutor requests for detention have risen dramatically over the past 20 years: in 1997, prosecutors sought detention in 56% of cases; in 2019, they did so in 77% of cases.²⁴

Congress can intercede to reduce this unjustified rate of federal pretrial detention, and curtail its impacts on access to counsel:

- **Pass the Smarter Pretrial Detention for Drug Charges Act of 2021**, 117th Congress (S. 309; H.R. 5722). This common sense proposal has bipartisan support in the House and the Senate, and would significantly reduce unnecessary pretrial detention by eliminating the Federal Bail Reform Act’s “presumption of detention” in certain drug cases.²⁵ A 2017 study by U.S. Probation & Pretrial Services that found that “[t]he presumption [of detention] has contributed to a massive increase in the federal pretrial detention rate,” and over-detains low-risk individuals in drug and gun cases.²⁶
- **Pass the Effective Assistance of Counsel in the Digital Era Act**, 117th Congress (S.3524; H.R. 546). In February, the House of Representatives passed this bill with overwhelming bipartisan support; Senators Wyden (D. Or.) and Lummis (R. WY) have co-sponsored a Senate companion. The bill would prohibit BOP from monitoring the contents of electronic

²² See AO Table H-15 (Dec. 31, 2019), available at Mot. for Bond, *United States v. Rodriguez*, No. 19-CR-77 (E.D. Wis. Apr. 2, 2020), ECF No. 41, Ex. 1, archived at <https://perma.cc/LYG4-AX4H> (Attachment C) (showing a nationwide failure-to-appear rate of 1.2% and a rearrest rate of 1.8% in 2019).

²³ In 2019, the six districts with the highest release rates (average 69.08%) had an average failure to appear rate of 0.42% and an average re-arrest rate of 0.91%. See *supra* note 25; Admin. Office of the U.S. Courts, *Judicial Business: Federal Pretrial Services Tables* (“AO Table”) *Table H-14A: U.S. District Courts --- Pretrial Services Release and Detention, Excluding Immigration Cases For the 12-Month Period Ending December 31, 2019*; see also Alison Siegler & Erica Zunkel, *Rethinking Federal Bail Advocacy to Change the Culture of Detention*, *The Champion* 46, 47 & fig. 1 (July 2020), <https://bit.ly/3BOU3vP>.

²⁴ See AO Table H-3A, U.S. District Courts --- Pretrial Services Recommendations Made for Initial Pretrial Release Excluding Immigration Cases for the 12-Month Period Ending Sept. 30, 2019, <https://bit.ly/3EQs28X> (Attachment D).

²⁵ 18 U.S.C. § 3142.

²⁶ Amaryllis Austin, *The Presumption for Detention Statute’s Relationship to Release Rates*, 81-SEP Fed. Probation 52, 57, 61 (2017), <https://bit.ly/3CRLn99>.

communications between incarcerated persons and their attorneys, with narrow exceptions.

CONCLUSION

For years, I have observed first-hand how USP Atlanta subjects people who are detained while they await trial and are presumed innocent to inhumane conditions. I have observed how USP Atlanta's practices interfere with individuals' constitutional right to effective assistance of counsel by failing to provide adequate access to counsel. Despite consistent and vigorous efforts by defenders to advocate for our clients and demand improvements, the conditions at USP Atlanta have only worsened. Because USP Atlanta has failed to improve its practices on its own and has flouted interventions by the court, I am skeptical that conditions will improve without aggressive action by Congress and the Department of Justice. It is long past time for drastic change.

Unfortunately, I know from defense counsel in other parts of the country that USP Atlanta is not alone in its unacceptable treatment of persons detained pretrial. This is unacceptable and must be systemically and aggressively addressed by Congress and Department of Justice leadership. I urge this Subcommittee to treat these issues with the urgent attention they deserve. Thank you for the invitation to share my perspective on these important issues.

EXHIBIT A

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,) [REDACTED]
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) JANUARY 26, 2016
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VERSUS)
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[REDACTED],)
DANT.)
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BEFORE THE HONORABLE AMY TOTENBERG
UNITED STATES DISTRICT COURT JUDGE
SENTENCING HEARING
VOLUME II

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75 TED TURNER DRIVE
ATLANTA, GA 30303

STENOTYPE/COMPUTER-AIDED TRANSCRIPTION
*** **

Colloquy

1 standing by their father, which is great, but it doesn't
2 necessarily tell me everything. I am glad to know that. And
3 I am glad for the future because I think it is a positive
4 thing for [REDACTED] future that they are there and
5 something for him to live by.

6 He is a complicated person, but I do know that up until
7 these incidents, he never had posed a danger for society.
8 It is not like I was seeing these -- we were seeing a history
9 of outbursts, violence before all of these incidents that we
10 are talking about and that probably with somebody
11 approximately at age 40 is about the best predictor of
12 anything else I could know. Not that anything is a perfect
13 predictor, people -- we have more and more understanding of
14 how people can be deranged and go off, even if we don't
15 understand the dynamics of that. So, I would be loathe to
16 make clear predictions, but the criminal history or the lack
17 of it is a good one and can't say age 50 he won't get back
18 into meth either. Although the older you get, the less
19 likely it is. It is not impossible, but this has been a no
20 doubt excruciating experience and part of the, you know, being
21 put into segregation simply by virtue of where you got put,
22 not because of anything else you did at the Atlanta Pen, makes
23 it all the more so. Because those are not the normal
24 conditions for most pretrial detainees to be in segregation
25 for 23 hours a day.

EXHIBIT B

DECLARATION OF [REDACTED]

My name is [REDACTED], and I am over the age of 18. The information contained in this DECLARATION is based upon my personal knowledge.

I am presently incarcerated at the United States Penitentiary in Atlanta, Georgia ("USP-ATL"). I have been at USP-ATL since May 2, 2019.

Since my arrival at USP-ATL on May 2, 2019, I am locked down inside my cell along with my cellmates for 24 hours for three to four days at a time. During the 24-hour lockdown, my cellmates and I are not allowed out of our rooms, nor are we allowed showers, telephone privileges, or visitation during this time. When we are allowed out of our cells every three to four days, we are only allowed out for approximately one hour. Showers have been provided once every five days where about 100 inmates are released from their cells and have a limited amount of time (approximately one hour total for everyone in the pod) in which to shower and/or use the telephone. There are approximately six showers and three phones in my pod, so it is impossible for all 100 inmates to use the shower and the phones in that very limited time.

Since my arrival at USP-ATL, I have been provided with one set of underclothes that I have been expected to wear for two to three weeks at a time, as I am not provided with a clean alternative.

Food is always served in our cells. For our dinner meal, only a sandwich is provided and the packages of sandwich meat indicate expiration dates of 2017 and 2018. Commissary is very limited, including only instant coffee and chips.

Due to the restrictive nature of the 24-hour lockdown policy at USP-ATL, I do not have access to telephone and/or computers at this facility. I am unable to communicate with my family and my attorney.

For several days during June and July 2019, there was no air conditioning nor any airflow inside of the cells.

Due to overcrowding, there are three people in two person cells. Roaches are visible in rooms/pods, and cleaning products are not available. Where I was previously at Robert A. Deyton Detention Facility, we were provided cleaning products to keep our cells clean. After seeing roaches in my cell here, I asked the guards for cleaning products, and they laughed at me.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on August 1, 2019

[REDACTED]

[REDACTED]

EXHIBIT C

DECLARATION OF [REDACTED]

My name is [REDACTED], and I am over the age of 18. The information contained in this DECLARATION is based upon my personal knowledge.

I am presently incarcerated at the United States Penitentiary in Atlanta, Georgia ("USP-ATL"). I have been at USP-ATL since October 2, 2019.

Since my arrival at USP-ATL on October 2, 2019, I am locked down inside my cell along with my cellmate for 24 hours for three to four days at a time. During the 24-hour lockdown, my cellmate and I are not allowed out of our rooms, nor are we allowed showers, telephone privileges, or visitation during this time. When we are allowed out of our cells on Monday, Tuesday, Thursday and Friday, we are only allowed out for approximately one hour to shower, make calls to family, use the computer to work on our case or talk to our attorney. There are long lines and it is impossible to do all of this in one hour. For the past ten months there have only been two or three working showers for 200+ inmates. A few weeks ago the number of working showers has moved up to five. If you have no money for Commissary then you have no toiletries. Since the Covid situation USP-ATL has been providing soap and some toiletries to keep the inmates clean but in a very limited quantity. Some of the cells in the pod have had plumbing issues and the toilets are not flushing.

Since my arrival at USP-ATL, I have been provided with one set of clothing, which consists of a jumpsuit, socks, t-shirt and boxer shorts. These items have to be washed in the sink and hung up to dry in your cell or outside in the summer time to dry faster. I have nothing to wear until they dry.

The food, which is terrible, is always served in our cells. For our dinner meal, only a peanut butter sandwich has been provided since March of 2020. The Commissary is very limited, and items provided have expired dates on them. There is no table or chair and I have to eat my meals on the bed or floor sitting near the toilet.

Due to the restrictive nature of the 24-hour lockdown policy at USP-ATL, I do not have access to telephone and/or computers at this facility. I am unable to communicate with my family and my attorney. There are also no activities, classes or programs available to the inmates

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on September ____, 2020.

[REDACTED]