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December 22, 2006

Federal Bureau of Prisons
Designation and Sentence Computation Center (DSCC)
Grand Prairie Office Complex
U S Armed Forces Reserve Complex
346 Marine Forces Drive
Grand Prairie, TX 75051
VIA FAX (972) 595-3152

Re: Designation of [REDACTED], Dkt. No. [REDACTED]

To the Members of the Designation Team:

The American Civil Liberties Unions of Delaware, Pennsylvania and New Jersey, along with the ACLU Lesbian Gay Bisexual Transgender & AIDS Project and the ACLU National Prison Project, write in support of a letter submitted to you today by Scott O'Keefe, counsel for [REDACTED] Ms. [REDACTED], a male-to-female (MTF) transgender prisoner, was sentenced in Delaware on November 16, 2006 after pleading guilty to passing counterfeit securities. After receiving threats and harassment while she was awaiting sentencing in a Delaware state prison, Ms. [REDACTED] was transferred to the Federal Detention Center in Philadelphia, where she currently awaits designation.

The undersigned affiliates and Projects of the ACLU respectfully urge you to exercise your discretion to designate Ms. [REDACTED] to a women's detention facility or to a Community Corrections Center (CCC), as permitted by 18 U.S.C. § 3621(b). As you know, the Third Circuit has determined that the Federal Bureau of Prisons may directly designate prisoners to CCCs prior to the last six months or ten percent of their sentences.¹

The classification and designation of prisoners based solely on whether they have undergone genital surgery puts MTF transgender prisoners at considerable risk of threats, assault, rape and other forms of sexualized violence, and even death.² MTF transgender inmates,

¹ Woodall v. Fed. Bureau of Prisons, 432 F.3d 235, 251 (3d Cir. 2005)

² Christine Peek, Comment, Breaking out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment, 44 SANTA CLARA L. REV. 1211, 1220 (2004); see also Courtney Joslin, National Center for Lesbian Rights Fact Sheet: Rights of Transgender Prisoners,

“[b]y virtue of their feminine appearance and the nature of the prison hierarchy,” are “disproportionately targeted for rape and other violence”³

The ACLU is concerned that a men’s prison facility will likely be unable to accommodate the special security needs of an MTF transgender prisoner, and may resort to an overly punitive segregated housing placement to protect Ms. [REDACTED] from threats of violence and harassment from male prisoners.⁴ Extended periods of time in protective custody, where Ms. [REDACTED] would be locked down for twenty-three hours per day, would unfairly burden and punish Ms. [REDACTED] in order to prevent attacks against her.

When considering whether to place MTF transgender prisoners in a women’s prison, it is important to remember that transgender women do not, because of their gender identity, pose any risk of harm to other female inmates. Transgender women are, in fact, women,⁵ and they face the same risk of physical harm and sexual abuse that other women would face if placed in a men’s facility. Although placement in a women’s facility would not eliminate the risk of violence against Ms. [REDACTED], it would dramatically reduce the risk of sexual assault, while also according with her true gender identity. Moreover, nothing about Ms. [REDACTED]’s criminal history suggests that she would pose a threat to the safety of other female prisoners.

Alternatively, we recommend that the BOP designate Ms. [REDACTED] to a Community Corrections Center, where she can serve the two years of her sentence under the close monitoring of correctional officers. Prisoners incarcerated in the Third Circuit can be directly designated to CCCs after full consideration of the factors in 18 U.S.C. §3621(b). This option would permit Ms. [REDACTED] to avoid landing at the bottom of a prison hierarchy that equates femininity with weakness,⁶ often leading to tragic results.

available at <http://www.ncrights.org/publications/tgprisoners.htm> (last visited December 21, 2006) (noting the safety and medical concerns of transgender prisoners); *Lesbian, Gay, Bisexual, Transgender and Intersex Human Rights in the United States: A Shadow Report*, at 16-17 (Global Rights 2006) (reporting cases of violence against transgender women in U.S. prisons), available at <http://www.ohchr.org/english/bodies/hrc/docs/ngos/LGBTI%20shadow%20report%20final.pdf>; United Nations Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the International Covenant on Civil and Political Rights*, CCPR/C/USA/Q/3/CRP.4, at 7, available at <http://www.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/CCPR.C.USA.CO.pdf> (July 2006) (noting “with concern allegations of widespread incidence of violent crime perpetrated against persons of minority sexual orientation, including by law enforcement officials”).

³ Peek, *supra* note 2, at 1248.

⁴ Debra Sherman Tedeschi, *The Predicament of the Transsexual Prisoner*, 5 TEMP. POL. & CIV. RTS. L. REV. 27, 35 (1996) (quoting Edward S. David, Comment, *The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma*, 7 CONN. L. REV. 288, 298 (1975) (“The pre-operative patient who has been on hormonal therapy is almost as likely to be subjected to sexual abuse in prison as the postoperative patient. The easiest solution for prison officials is to isolate such an inmate, but that raises constitutional Eighth Amendment issues just as quickly as does the exposure to the other inmates.”)).

⁵ See, e.g., *Crosby v. Reynolds*, 763 F. Supp. 666 (D. Me. 1991) (rejecting privacy claim of female detainee housed in jail cell with pre-operative MTF transgender prisoner based on jail physician’s recommendation that the transgender prisoner was psychologically female and placement with female detainees would be in her best physical and psychological interest).

⁶ Terry A. Kupers, *Rape and the Prison Code*, in *PRISON MASCULINITIES* 111, 115 (Don Sabo et al. eds., 2001).

We strongly urge you to consider our recommendations for the safety and wellbeing of Ms. [REDACTED]. Placement in a women's facility or in a Community Corrections Center may greatly reduce the risk of sexual assault, threats and other violence, and correspondingly reduce the prison's potential liability for §1983 claims resulting from violence by male prisoners.⁷

Sincerely,



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⁷ See, e.g., *Farmer v. Brennan*, 511 U.S. 825 (1994) (prison officials involved in transferring MTF transgender prisoner to maximum security facility where she was beaten and raped were not entitled to summary judgment); *Powell v. Schriver*, 175 F.3d 107 (2d Cir. 1999) (holding that qualified immunity did not protect prison official from claim that the disclosure of the inmate's transgender status constituted deliberate indifference to a substantial risk of serious harm, in violation of the Eighth Amendment); *Greene v. Bowles*, 361 F.3d 290 (6th Cir. 2004) (finding that a transgender prisoner who was attacked by another inmate had raised a triable issue of fact as to deliberate indifference "because of her status as a vulnerable inmate"); *R.G. v. Koller*, 2006 WL 291637, at *23-24 (D. Haw. Feb. 7, 2006) (placing lesbian, gay, bisexual and transgender juvenile offenders in isolation to protect them from abuse by other wards violated their due process rights); *DiMarco v. Wyoming Dep't of Corrections*, 300 F. Supp. 2d 1183 (D. Wyo. 2004) (segregating intersex prisoner from the general population of a male prison for 438 days in severe conditions violated her due process rights); *Tates v. Blanas*, 2003 U.S. Dist. LEXIS 26029 (E.D. Cal. Mar. 6, 2003) (holding that transgender inmate's constitutional rights were violated by jail's blanket policy of automatically placing all transgender detainees in "total separation," thus exposing them to harsh conditions normally reserved for most dangerous inmates).