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**SUPREME COURT
STATE OF ARIZONA**

Petitioner,

v.

DAVID SHINN, Director, Arizona
Department of Corrections,
Rehabilitation & Reentry; GERALD
W. THOMPSON, Warden, ASPC-
Lewis, Arizona Department of
Corrections Rehabilitation &
Reentry,

Respondents.

Cause Number HC-20-0024

Maricopa County Superior Court
Cause Nos. CR2016-XXXX-001 DT
CR2014-XXXX-001-DT

**PETITION FOR WRIT OF HABEAS
CORPUS (VERIFIED)**

Pursuant to Ariz. Const. art. 2, § 14 and A.R.S. §§ 13-4121 *et seq.*,
Petitioner, through undersigned counsel, moves the Court to issue a writ of habeas
corpus ordering his release from the Arizona Department of Corrections to home
detention. The petition for writ of habeas corpus is supported by the following
memorandum of points and authorities.

RESPECTFULLY SUBMITTED this 26th day of March 2020.

By: /s/Katia Méhu
KATIA MÉHU
PCR Counsel for Petitioner

MEMORANDUM OF POINTS AND AUTHORITIES

In *Griswold v. Gomes*, 111 Ariz. 59, 62, 523 P.2d 490, 493 (1974), the Court noted that the purpose "of habeas corpus is to test the legality and correctness of a prisoner's judgment and confinement." Exposure to a pandemic in high-risk conditions is not part of Petitioner's sentence. Petitioner seeks release from penal confinement during the COVID-19 global pandemic because he is an older non-violent inmate at high risk of serious illness and death from a contagious respiratory disease.

Release of low-level non-violent offenders serving long sentences is not unheard of. During the Obama administration, 1,928 low-level non-violent offenders serving long sentences were granted executive clemency.¹ On March 22, 2020, the Supreme Court of New Jersey exercised its discretion to permit the filing of a request for relief directly in the supreme court. Thereafter the supreme court commuted or suspended county jail sentences for inmates incarcerated either as a condition of probation for an indictable offense or because of a municipal court

¹ United States Sentencing Commission, *An Analysis of the Implementation of the 2014 Clemency Initiative* (September 2017), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170901_clemency.pdf, (last visited on March 25, 2020).

conviction.² The Court is likewise constitutionally and statutorily empowered to grant Petitioner, and others similarly situated, relief.

(A) Petitioner Characteristics and Place of Confinement

¶ 1 Petitioner is a 61-year-old inmate in poor health who suffers from high blood pressure, type 2 diabetes, high cholesterol, deep vein thrombosis, peripheral neuropathy, abdominal hernia, and sensorineural (inner ear) hearing loss. News of the pandemic has reached prisons across the United States and Petitioner asked his sister to send him paper to write his last will and testament.

¶ 2 Petitioner began serving his sentences on August 4, 2017, when the Superior Court of Maricopa County remanded him to the custody of the Arizona Department of Corrections to serve concurrent terms of imprisonment totaling 15.75 calendar years. (Exhibit A, Order of Confinement, dated 8/4/2017; Exhibit B, Sentencing Minute Entry.)

¶ 3 The primary charge is a conviction for possession of dangerous drugs for sale (Methamphetamine), a Class 2 Felony.³ (Exhibit A.)

² *Consent Order In the Matter of the Request to Commute or Suspend County Jail, Sentences*, Supreme Court of New Jersey, Docket 084230 (March 22, 2020) available at <https://www.njcourts.gov/notices/2020/n200323a.pdf?c=OeO>; see also, New Jersey Supreme Court Press Release, *Supreme Court-Ordered Mediation Yields Agreement on Release of Low-Risk County Jail Inmates*, available at <https://www.njcourts.gov/pressrel/2020/pr032320a.pdf?c=vXx> (published March 23, 2020).

¶ 4 Direct review proceedings concluded on January 8, 2019, upon denial of review by the Court. (Supreme Court Order, dated 01/08/2019; Court of Appeals Mandate, dated 01/30/2019.)

¶ 5 Petitioner is currently pursuing post-conviction relief and is represented by undersigned counsel.

¶ 6 Petitioner is presently confined at Lewis Complex Stiner Unit. (Exhibit C, DOC Inmate Datasearch Report.)

¶ 7 The Department of Corrections projects that Petitioner will be released from confinement on December 26, 2029. (Exhibit C.) In 2029, Petitioner will be 71 years old.

¶ 8 During confinement, Petitioner has had no disciplinary infractions. (Exhibit C.)

¶ 9 The Arizona Department of Corrections has placed Petitioner in a low custody category: medium/lowest. (Exhibit C.)

¶ 10 Petitioner is scheduled to be released from confinement when he is 71 years old and will then serve a term of probation for 1.5 years with credit for 276 days of presentence incarceration in the secondary case. (Exhibit D, Order of

³ On direct review, the court of appeals held that the statute of conviction (§ 13-3407(F)) expressly required the court to impose a calendar-year prison term. The Court summarily denied review. (Supreme Court Order, dated 01/08/2019.)

Confinement.) Petitioner sustained the conviction in the secondary case for burglary in the third degree, a Class 4 Felony. (Id.)

¶ 11 Before incarceration, a probation violation report documented that Petitioner was a low risk offender:

No alcohol related arrests; the defendant does not have attitudes supportive of crime; He believes his plea is fair; He would like to be supervised in the community; He does not have a poor attitude toward authority figures; He used marijuana for a short time at the age of twenty-two; The defendant denies the use or experimentation of any other illicit substance; He denies current substance abuse; He graduated from high school; He attended Rio Salado College and is two credits short of an associate's degree; No history of mental health.

(Exhibit E, Probation Violation Report at 3.)

Particularly relevant to these proceedings, Petitioner owns his own home and receives a pension:

The defendant lives alone in a house he owns; The defendant has been retired since November 2012; He previously worked as a certified welder; He is able to meet his financial obligations; The defendant served in the United States Navy between 1976 and 1980; He was granted an honorable discharge; He played football for the Navy and suffered injuries to his knee.

(Exhibit E.)

¶ 12 During the sentencing hearing, the trial court noted that Petitioner's criminal history did not warrant an aggravated sentence:

When I look at the aggravating and mitigating factors and I'm also looking at your age at the time of the offenses as well and, like I said, what your priors were for, I don't believe that exceeding the presumptive sentence is appropriate.

(Exhibit F, R.T. 08/04/17, at 46.)

**(B) Basis for Requesting issuance of a writ of habeas corpus:
Petitioner's life and health is endangered by a contagious
disease**

¶ 13 On or about December 31, 2019, the World Health Organization ("WHO") was notified that a pneumonia of unknown cause was detected in Wuhan, China. (See, WHO, Rolling Updates on Coronavirus Disease (COVID-19))⁴

¶ 14 WHO declared the outbreak a Public Health Emergency of International Concern on January 30, 2020. (Id.)

¶ 15 First simply called "coronavirus," the disease has been named "coronavirus disease 2019" ("COVID-19") and the Center for Disease Control ("CDC") explains that COVID-19 is a respiratory disease spreading from person-to-person caused by a novel (new) coronavirus.

¶ 16 Addressing the severity of the contagion, the CDC informs that COVID-19 is presenting as a respiratory illness that causes mild to severe illness with the most severe illness occurs in older adults:

The complete clinical picture with regard to COVID-19 is not fully known. Reported illnesses have ranged from very mild (including some with no reported symptoms) to severe, including illness resulting in death. While information so far

⁴ (WHO Rolling Updates on Coronavirus Disease (COVID-19) /Events as they Happen, available at <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen> (last visited on March 23, 2020).)

suggests that most COVID-19 illness is mild, a report external icon out of China suggests serious illness occurs in 16% of cases. Older people and people of all ages with severe chronic medical conditions — like heart disease, lung disease and diabetes, for example — seem to be at higher risk of developing serious COVID-19 illness. A CDC Morbidity & Mortality Weekly Report that looked at severity of disease among COVID-19 cases in the United States by age group found that 80% of deaths were among adults 65 years and older with the highest percentage of severe outcomes occurring in people 85 years and older.

(CDC Situation Summary for Coronavirus Disease 2019 (COVID-19)).⁵

¶ 17 The CDC has identified that the risk of severe illness is highest amongst older adults (with risk increasing by age) and people who have serious chronic medical conditions such as heart disease, diabetes, or lung disease. (Id.)

¶ 18 The CDC projects that the widespread transmission of COVID-19 could result in large numbers of people needing medical care at the same time.⁶ (Id.)

¶ 19 The CDC notifies that there is no vaccine to protect against COVID-19 at this time and no medications approved to treat it. Further

⁵ (CDC Situation Summary for Coronavirus Disease 2019 (COVID-19) available at <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html#severity>, (last visited on March 23, 2020).)

⁶ (See also https://www.washingtonpost.com/national/disaster-waiting-to-happen-thousands-of-inmates-released-as-jails-face-coronavirus-threat/2020/03/24/761c2d84-6b8c-11ea-b313-df458622c2cc_story.html, (last visited on March 25, 2020).)

"nonpharmaceutical interventions will be the most important response strategy to try to delay the spread of the virus and reduce the impact of disease." (Id.)

¶ 20 As of March 23, 2020, the number of global coronavirus cases surged past 300,000 with more than 16,000 deaths worldwide, according to John Hopkins University, which reported that China, Italy, and the United States had the most people diagnosed with the respiratory illness. (See John Hopkins University of Medicine, Coronavirus Resource Center statistics and tracking map.)⁷

¶ 21 Arizona reported its first death from COVID-19 on March 20, 2020, and the media later revealed that the decedent was a Maricopa County man in his fifties with underlying health conditions. (See, Arizona Department of Health Website; see also AZFamily.com article.)⁸

⁷ (John Hopkins University of Medicine, Coronavirus Resource Center, <https://coronavirus.jhu.edu/map.html>, (last visited on March 23, 2020).) The figures cited above are graphically represented in the map below provided by the Coronavirus COVID-19 Global Cases by the John Hopkins University Center for Systems Science and Engineering.



⁸ (See Arizona Department of Health Website, <https://www.azdhs.gov/index.php> (last visited on March 23, 2020); See also AZFamily.com article,

¶ 22 As of March 22, 2020, the Arizona Department of Health notes that the likelihood of community spread in Arizona is moderate. (Id.)

¶ 23 Governor Doug Ducey declared COVID-19 a statewide emergency on March 11, 2020, and later issued an executive order noting that COVID-19 is contagious and can be fatal. (Governor Executive Order: 2020-07, issued March 19, 2020.)⁹

¶ 24 Governor Ducey also declared that the elderly population and those with serious underlying health conditions are most at risk from COVID-19. (Id.)

¶ 25 On March 16, 2020, the Court issued an administrative order limiting court operations during a public health emergency. (Arizona Supreme Court AO 2020-47 (dated 03/16/2020) and replaced by AO 2020-48 (dated 03/18/2020).)¹⁰

¶ 26 The Court had also issued Administrative Order 2020-44, wherein it noted that State and local public health agencies are authorized by state statutes

https://www.azfamily.com/news/continuing_coverage/coronavirus_coverage/first-arizona-coronavirus-death-was-a-phoenix-sky-harbor-employee/article_10e18b0c-6b1a-11ea-bc91-176b128631cd.html, (last visited March 23, 2020).)

⁹ (See Governor Executive Order 2020-07: Proactive Measures to Protect Against COVID-19 (March 19, 2020) available at <https://azgovernor.gov/executive-orders> (last visited March 23, 2020).)

¹⁰ (See Arizona Supreme Court Administrative Order 2020-48, available at <http://www.azcourts.gov/Portals/22/admorder/Orders20/2020-48.pdf>, (last visited March 23, 2020).)

and Arizona Department of Health Services regulations to order measures to prevent and control communicable and infectious diseases, such as the COVID-19 virus. (Arizona Supreme Court AO 2020-44 (dated 03/13/2020).)¹¹

¶ 27 The Arizona Department of Corrections ("ADCRR") has likewise issued administrative orders addressing COVID-19. On March 13, 2020, ADCRR suspended visitation on the following rationale:

With additional cases of COVID-19 expected in Arizona, the Department is taking this action to mitigate the potential spread of COVID-19 within our prisons and its impact on staff and inmates, as well as to ensure the continued effective operation of the state correctional system in the service of public safety.

(ADCRR COVID-19 Management Strategy, Temporary Suspension of Visitation, dated 03/13/2020).¹²

¶ 28 ADCRR issued a COVID-19 Management Strategy Update on March 18, 2020, and therein stated that it would take a number of preemptive and precautionary actions to protect the health and safety of its employees and the inmates in its care. (ADCRR COVID-19 Management Strategy Update, dated

¹¹ (See Arizona Supreme Court Administrative Order 2020-44, available at <http://www.azcourts.gov/Portals/22/admorder/Orders20/2020-44.pdf>, (last visited March 23, 2020).)

¹² (See ADCRR COVID-19 Management Strategy, Temporary Suspension of Visitation, dated 03/13/2020, available at <https://corrections.az.gov/sites/default/files/notifications/new-actions-to-mitigate-covid-19-risk.pdf> (last visited March 23, 2020).)

03/18/2020).¹³ Planned action include waiver of copay for access to health care services, free hand soap to all inmates upon request, weekly deep cleaning of all facilities, and requiring employees entering prison complexes to undergo an infectious disease symptoms check. (Id.)

¶ 29 On March 20, 2020, ADCRR issued another strategy update wherein it informed that "All ADCRR staff and inmates continue to be evaluated daily for any flu or allergy-like symptoms at prison complex facilities." (ADCRR COVID-19 Management Strategy Update, dated 03/20/2020).¹⁴

¶ 30 In ADCRR's FY 2020 Appropriations Report, it lists 9,566 full time equivalent employee positions. (ADCRR FY 2020 Appropriations Report.)¹⁵

¶ 31 As of February 2020, ADCRR reports that the total inmate population is 42,282 persons. (ADCRR Institutional Capacity & Committed Population, February 2020 Report.)¹⁶

¹³ (See ADCRR COVID-19 Management Strategy Update, dated 03/18/2020, available at https://corrections.az.gov/sites/default/files/notifications/adcr_covid-19_management_strategy_update_3-18-2020.pdf, (last visited March 23, 2020).)

¹⁴ (See ADCRR COVID-19 Management Strategy Update, dated 03/20/2020, available at <https://corrections.az.gov/sites/default/files/notifications/media-advisory-adcr-covid-19-update-3-20-20.pdf>, (last visited March 23, 2020).)

¹⁵ (See ADCRR FY 2020 Appropriations Report, available at https://corrections.az.gov/sites/default/files/documents/PDFs/adcr-appropriationsreport_fy2020.pdf (last visited March 23, 2020).)

¶ 32 The total inmate population at Lewis Prison Complex in February 2020 was 4,582 inmates. (Id.)

(C) Prayer for relief: release from confinement to home detention to ensure that the life of Petitioner is not endangered during the pandemic.

¶ 33 A.R.S. §13-4121 provides that a person unlawfully committed, detained, confined or restrained of his liberty, may petition for and prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint.

¶ 34 A.R.S. § 31-106 statutorily provides for the removal of prisoners when a pestilence or contagious disease occurs in or near a jail that it is liable to endanger the health of prisoners.

¶ 35 A.R.S. § 31-107 provides for the emergency removal of prisoners when a county jail or building contiguous to it is on fire and there is reason to apprehend that the prisoners may be injured or endangered.

¶ 36 Under *Helling v. McKinney*, 509 U.S. 25, 33 (1993), state courts have an affirmative obligation to protect the incarcerated against infectious disease. *Helling*, a case contesting involuntary exposure to environmental tobacco smoke, notes that "[i]t would be odd to deny an injunction to inmates who plainly proved

¹⁶ (See ADCRR Institutional Capacity & Committed Population, February 2020 Report, available at https://corrections.az.gov/sites/default/files/REPORTS/Monthly_CP/bed_capacity_2020/bed-capacity_feb20.pdf, (last visited March 23, 2020).)

an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them." *Id.*

¶ 37 The measures taken by the Department of Corrections to date are not sufficient to safeguard the life and safety of Petitioner Petitioner and others similarly situated.

¶ 38 Nor will the Department of Corrections have the ability to provide a safe environment in an institutionalized setting. Like the Federal government, ADCRR does not have a coordinated respond to combat contagious disease. For example, five defendants on death row scheduled to die by lethal injection died by disease—Hepatitis C.¹⁷

¶ 39 Risk mitigation at ADCRR encompasses deep cleaning but does not provide for the spatial distance between persons required by the CDC.

¶ 40 The COVID-19 pandemic presents a grave risk of harm, including serious illness and death, to people over age 50 and those with certain medical conditions.¹⁸

¹⁷ (See Arizona Central Online, *Arizona Death-Row Inmates Killed by Hepatitis C, Not Lethal Injection*, published 03/19/2018, available at <https://www.azcentral.com/story/news/local/arizona/2018/03/19/arizona-death-row-inmates-felled-hepatitis-c-not-lethal-injections/430016002/>, (last visited March 23, 2020).)

¹⁸ The advocacy set forth in this section is culled from the Petition for Writ of Habeas Corpus filed by the New York Legal Aid Society on March 19, 2020, on behalf of 116 inmates incarcerated in Kings County Rikers Island Jail Complex.

¶ 41 Twelve percent of the prison population in Arizona is comprised of inmates above 55.¹⁹

¶ 42 Most people in higher risk categories who develop serious disease will need advanced supportive care requiring highly specialized equipment that is in limited supply, and an entire team of care providers, including 1:1 or 1:2 nurse to patient ratios, respiratory therapists, and intensive care physicians. (See generally, *Williams PWHC*.) This level of support can quickly exceed local health care resources. Patients in high-risk categories should expect a prolonged recovery, including the need for extensive rehabilitation for profound reconditioning, loss of digits, neurologic damage, and the loss of respiratory capacity. The need for care, including intensive care, and the likelihood of death, is much higher from COVID-19 than from influenza.

¶ 43 The imprisoned face an elevated risk of COVID-19 transmission. (See generally, *Williams PWHC*.) Infectious diseases that are communicated by air or touch are more likely to spread in congregate environments such as jails and prisons. The highest known person-to-person transmission rate for COVID-19 to

The petition is lodged as *Williams, et al, v. Brann (Commissioner, New York City Department of Corrections)*, available at https://legalaidnyc.org/wp-content/uploads/2020/03/COVID-Mass-Writ-Manhattan-FINAL_116.pdf (last visited March 23, 2020).)

¹⁹ (<https://corrections.az.gov/sites/default/files/REPORTS/CAG/2020/cagjan-20.pdf>) (last visited on March 26, 2020))

date took place in a skilled nursing home facility in Kirkland, Washington, and on afflicted cruise ships in Japan and off the coast of California. A woman in South Korea, identified as Patient 31 is estimated to have infected 1,600 people through community transmission.²⁰

¶ 44 Conditions in jails and prisons pose a higher risk of the spread of COVID-19 than in non-carceral facilities like a nursing home or communal locations such as cruise ships or churches. (See generally, *Williams PWHC*.) Jails and prisons house inmates in close quarters and place the incarcerated at greater risk of infection. Prison and jail design do not permit the incarcerated to engage in the necessary social distancing required to mitigate the risk of transmission. Many are housed in dormitory-like sleeping arrangements. The incarcerated have limited freedom of movement and no control over the movements of others with whom they are required to congregate on a daily basis. They are unable to maintain anything close to the recommended distance of 6 feet from others.

¶ 45 As noted in Paragraph 19 above, the CDC has advised that risk mitigation is the only known strategy to protect vulnerable groups from COVID-19. Continued confinement of high-risk, low-level offenders exposes them to risk

²⁰ (See <https://www.japantimes.co.jp/news/2020/02/27/asia-pacific/science-health-asia-pacific/south-korea-coronavirus-epidemic/#.XnjbR-pKjIU>, (last visited March 23, 2020).)

of serious medical harm. Failure to release petitioners constitutes deliberate indifference to serious medical harm.

¶ 46 Exposure to pandemic is not part of the sentence imposed on the incarcerated²¹ and inaction by state authorities deprive prisoners like Petitioner of constitutional protections due him under the Eighth Amendment, which imposes a duty to furnish inmates' basic human needs including "reasonable safety." *DeShaney v. Winnebago County*, 489 U.S. 189, 199-200 (1989). Further, it is "cruel and unusual punishment to hold convicted criminals in unsafe conditions." *Youngberg v. Romeo*, 457 U.S. 307, 315-316 (1982).

¶ 47 Petitioner is also entitled to the Equal Protection of Laws under the Fourteenth Amendment and to the same protection Arizona is according the citizenry (and 9,566 ADCRR personnel) under the many administrative orders issued in the last two weeks. The State has a duty to ensure the health and safety

²¹ (Bree Boppre, Criminologist & Assistant Professor, Twitter @bree-bop "Exposure to a pandemic in high-risk conditions is not part of someone's sentence nor should it be considered "bonus" punishment. *Woman facepalming* These are human lives." (dated 10:00 AM, Mar 23, 2020), available at https://twitter.com/bree_bop/status/1242088848764657666. See also



of its citizens. This is an inalienable right that even prisoners retain. Putting Petitioner through a disproportionate risk is a gross breach of that right.

¶ 48 In addition, statutory law mandating that the State remove jailed detainees from danger during pestilence, disease, or emergency applies equally to the imprisoned.

¶ 49 There are societally acceptable alternatives to confinement in a penitentiary under conditions that may result in serious illness and death.

¶ 50 Release on home detention is appropriate for Petitioner. As set forth above, he meets the criteria of low-level non-violent offender. Home detention will accomplish the same objectives as confinement for a compliant inmate like Petitioner. In addition, Petitioner owns a home in Arizona that is currently habitable. Petitioner, a retired welder, has a pension sufficient to meet his needs. Petitioner is not a flight risk as his medical conditions must be carefully managed and he has lived in Arizona for most of his life.

(D) Conclusion

¶ 51 In the interest of expediency and to avoid incarceration in closer quarters at county jail, Petitioner expressly waives the right under A.R.S. § 13-4125 to be transported to Court for any hearing on this matter. In accordance with the provisions of A.R.S. § 13-4126, Petitioner requests that the writ be delivered to

the sheriff with directions to serve the writ upon such officer or person by delivering the writ to him without delay.

RESPECTFULLY SUBMITTED this 26th day of March, 2020.

By: /s/Katia Méhu
KATIA MÉHU
PCR Counsel for Petitioner

A.R.S. § 13-4122 Verification

Undersigned counsel verifies that she drafted and read the foregoing petition and that same is true to her own knowledge, except for those portions stated on information and belief, for which citations are provided.

Dated: March 26, 2020

/s/Katia Méhu
KATIA MÉHU