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CLIENT NAME

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

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| UNITED STATES OF AMERICA,  Plaintiff,  vs.  CLIENT NAME,  Defendant. |  | Case No. CASE NUMBER  MOTION FOR BAIL REVIEW;  EXHIBITS A-  Date: DATE  Time: TIME  Judge: JUDGE |

CLIENT NAME requests, through undersigned counsel, Assistant Federal Defender ATTORNEY NAME, that HIS/HER case be set for a bail review hearing on DATE, at TIME, or as soon thereafter as counsel may be heard before the Honorable JUDGE, United States Magistrate Judge. As previously discussed between the parties and the Court, the parties intend to appear telephonically for the hearing and CLIENT NAME is requesting a waiver of HIS/HER appearance.[[1]](#footnote-1)

1. **PROCEDURAL HISTORY**

**SUMMARIZE FOR YOUR CASE**

1. **NEW INFORMATION/CHANGED CIRCUMSTANCE: COVID-19**

UPDATE THIS INFORMATION FOR THE DATE OF YOUR FILING As of March 18, 2020, SARS-COV-2, a novel coronavirus causing COVID-19, has infected over 211,200 people worldwide, leading to at least 8,822 deaths, and 147 deaths in the United States.[[2]](#footnote-2) The President of the United States has declared a national emergency.[[3]](#footnote-3) Our country is still behind the curve on community testing, and we do not know the true extent of community spread as of the date of this filing.[[4]](#footnote-4)

Nearly every city in California is experiencing a COVID-19 outbreak via community transmission. The virus has a mortality rate ten-times (10x) greater than the seasonal flu and is more infectious than the Ebola virus. Emerging studies regarding COVID-19 indicate that the spread of the virus is mostly via respiratory droplets among close contacts[[5]](#footnote-5) and through contact with contaminated surfaces or objects. Newly emerging evidence that the virus may be viable for hours in the air is particularly concerning for those who reside in small, confined spaces with poor ventilation.[[6]](#footnote-6)

We have reached the point where community spread is occurring throughout the United States, with the number of cases is growing exponentially by the day. Our health systems are already strained, and social distancing measures have been recommended by the Center for Disease Control (CDC).[[7]](#footnote-7) The recommended social distancing measures are nearly impossible to implement and adhere to in detention facilities where detained individuals share dining, bathing and sleeping areas, and testing for the virus in county jails remains largely unavailable. In addition to threatening the well-being of detained individuals, COVID-19 is a threat to corrections staff who necessarily move between the community and the detention facilities where they work.

1. ***Conditions in Detention Facilities***

Jails and prisons are designed to maximize control of the incarcerated population, not to

minimize disease transmission or to efficiently deliver health care. Pretrial detention facilities, including the SACRAMENTO COUNTY MAIN JAIL, **Fresno County Jail and Lerdo Detention Facility**, are crowded with unsanitary conditions, poor ventilation, lack of adequate access to hygienic materials/cleaning supplies such as soap and water or hand sanitizers, and offer poor nutrition. Moreover, the frequent transfer of individuals from one location to another, and intake of newly detained individuals from the community compounds issues with disease control and complicates the prevention and detection of infectious disease outbreaks. Particularly with regard to COVID-19, a timely response to reported and observed symptoms is needed to interrupt viral transmission, however delays in testing, diagnosis and access to care are systemic in jails and prisons.

FOR SACRAMENTO JAIL Like Sacramento County defendants, our clients are faced with the overpopulation, lack of health care, and unsanitary conditions found by the Court in Mays v. Sacramento County. According to the Board of State and Community Corrections, an estimated 3,700 persons are in the custody of the Sacramento County Main Jail and its Rio Cosumnes Correctional Facility (RCCC). In comparison, San Francisco County houses 1100 inmates. Housing for persons in Sacramento’s main jail and RCCC, involves shared rooms and pods. The physical structure of the shared room space does not allow for the 6 feet social distancing order. The physical structure of both facilities does not allow for inmates to humanely isolate themselves if they are sick. Our clients are reporting that they are being denied access to hygiene cleaning items since the pandemic was announced. Inmates are locked-down in response to the encroaching pandemic, which means that they are denied showers and other means to help protect themselves against disease.

Even prior to the pandemic, individuals housed in the jail were exposed regularly to unsanitary conditions and given a lack of access to hygienic supplies. Disinfection cannot occur to the levels necessary within the jail. These conditions of Sacramento County jails concerning COVID-19 are heightened by the employee-assisted transfer of inmates from one jail facility to another. This frequent transfer of individuals from one location to another, creates a whole new level of concern and possible contamination of our Sherriff’s workers within the jail, and individuals housed in the jail. Unlike the Sacramento County Superior Court, the Eastern District Court has not shut down, and Federal Defender clients will have to be brought to court and back to the jail. Likewise, new arrests persist in the Federal system.

For these reasons, transmission of infectious diseases in jails and prisons is not uncommon, particularly those transmitted by respiratory droplets. It is estimated that up to a quarter of the US prison population has been infected with tuberculosis[[8]](#footnote-8), with a rate of active TB infection that is 6-10 times higher than the general population.[[9]](#footnote-9) Flu outbreaks frequently occur in jails and prisons throughout the United States.[[10]](#footnote-10)

FOR FRESNO In recognition of the serious threat of a COVID-19 outbreak at the Lerdo facility, where CLIENT NAME is presently housed, the Kern County Sheriff has already released 38 inmates who meet the criteria for expedited release and/or location monitoring outside of the detention facilities based on age and medical condition, and who are not facing charges of violence.[[11]](#footnote-11)

FOR SACRAMENTO MAIN JAIL The Sacramento County Superior Court and Sheriff’s Office have begun to reduce the Sacramento Main Jail population in various ways, including the release of low-level inmates. The Sacramento County District Attorney has also recognized the criticality of reducing the population at the Sacramento Main Jail. On March 19, 2020, during the county’s press conference ordering “Shelter-In-Place,” District Attorney Anne Marie Schubert stated, “It is everyone’s moral responsibility to act today, not tomorrow or next week.” Although Sacramento County has acted quickly to begin to reduce the jail population, those actions do not impact federal jail inmates.

1. ***CLIENT NAME’S Vulnerability***

SUMMARIZE There are currently no antiviral drugs licensed by the U.S. Food and Drug Administration (FDA) to treat COVID-19, or post-exposure prophylaxis to prevent infection once exposed.

1. **ARGUMENT**
2. ***The 5th Amendment Due Process Clause Compels the Court to Protect CLIENT NAME from Punitive Conditions of Confinement and Ensure that CLIENT NAME is Afforded Adequate Medical Care.***

A pretrial detainee’s freedom from pretrial confinement is a fundamental right protected by the Due Process Clause; any government action infringing on this right must be narrowly tailored to achieve a compelling government interest. *United States v. Salerno*, 481 U.S. 739, 755 (1987). The constitutional protections of pretrial detainees arise under the Fifth Amendment Due Process Clause, which provides protection even greater than the Eighth Amendment. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). The Eighth Amendment, which applies to persons convicted of criminal offenses, allows punishment as long as it is not cruel and unusual, but the Fifth Amendment’s due process protections do not allow pretrial punishment at all. *Id.* Although the Government has an interest in detaining a defendant to secure their appearance at trial, Government may only subject a detainee “to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment, or otherwise violate the Constitution.” *Id.* at 536–37.In *Kingsley v. Hendrickson*, the Supreme Court affirmed the Due Process Clause’s prohibition on pretrial punishment, and elaborated that “if the condition of confinement being challenged ‘is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment.’” 135 S. Ct. 2466, 2470 (2015); *see also* *Doe v. Kelly,* 878 F.3d 710 (9th Cir. 2017) (“a particular restriction or condition is punishment if the restriction or condition is not reasonably related to a legitimate governmental objective or is excessive in relation to the legitimate governmental objective”).

In addition, pretrial detainees have a substantive due process interest in freedom from deliberate indifference to their medical needs. *Miranda v. Cty. of Lake*, 900 F.3d 335, 352 (7th Cir. 2018). Furthermore, in *Brown v. Plata*, the Supreme Court explained that a prisoner “may suffer or die if not provided adequate medical care. A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.” 563 U.S. 493, 510–11 (2011). While prisoner claims in *Brown v. Plata* arose under the Eighth Amendment, pretrial detainees likewise have the legal right to adequate medical care, given that their rights are at least as great as those of convicted persons being punished by imprisonment.

Here, CLIENT NAME has not yet received a sentence or final judgement in HIS/HER case, and is entitled to the protections that must be afforded to pretrial detainees. The current conditions of confinement create an unreasonable risk of exposure to COVID-19 and do not provide the necessary supplies for personal and environmental hygiene necessary to protect against contraction of the virus. Accordingly, in light of the extreme risk to CLIENT NAME’s health posed by the virus and the ever-increasing likelihood that HE/SHE will contract it if HE/SHE remains housed under current conditions, the conditions of HIS/HER confinement should be deemed punitive, in violation of the 5th Amendment. FRESNO Furthermore, given that COVID-19 testing is not being offered to inmates at the Lerdo Detention Facility and has not been offered to CLIENT NAME, despite HIS/HER age and condition, HE/SHE is not being afforded adequate medical care under the present circumstances. As such, release is appropriate to ensure HIS/HER constitutional rights are protected and HIS/HER life is not jeopardized during this crisis.

1. ***The 8th Amendment Prohibition Against Cruel and Unusual Punishment Compel Release Under these Extraordinary Circumstances***

The government, in detaining defendants pretrial, must take sufficient protective measures to prevent contraction of COVID-19 in the jail population. Unreasonable risk of COVID-19 contraction will, in itself, constitute an Eighth Amendment violation.

The Supreme Court has held that exposure to environmental threats to an incarcerated person´s physical wellbeing where exposure is preventable could constitute a violation of the 8th Amendment´s prohibition against cruel and unusual punishment. *See Helling v. McKinney*, 509 U.S. 25, 28 (1993). In *Helling,* a plaintiff alleged that he was assigned to a cell with another inmate who smoked five packs of cigarettes per day.  *See* *Id*. at 28. At issue was whether this exposure to environmental tobacco smoke (ETS) could constitute a valid claim under the Eighth Amendment, even though the plaintiff had not yet suffered harm.  *Id.* at 30. The Supreme Court upheld the decision of the Court of Appeals, finding that the plaintiff stated “a cause of action under the Eighth Amendment by alleging that petitioners have, with deliberate indifference, exposed him to levels of ETS that pose an unreasonable risk of serious damage to his future health.”  *Id.* at 35. “Though *Helling* directly addressed an inmate's exposure to [secondhand smoke], it tacitly acknowledged other situations in which environmental factors can pose an unreasonable risk to an inmate’s health, including exposure to ‘infectious maladies such as hepatitis and venereal disease’ caused by overcrowding, unsafe drinking water, and ‘toxic or other substances.” *Allen v. Kramer*, 2016 U.S. Dist. LEXIS 115024, 2016 WL 4613360, at \*7 (E.D. Cal. Aug. 17, 2016) (quoting *Helling*, 509 U.S. at 33, 35.)

The Ninth Circuit has applied *Helling* to exposure to asbestos finding it was “uncontroverted that asbestos poses a serious risk to human health” and the plaintiff “proffered specific evidence showing that the defendants knew of the existence of and dangers posed by asbestos.” *Wallis v. Baldwin* 70 F.3d 1074 (9th Cir. 1995). *Helling* has also been applied to “contagious diseases caused by overcrowding conditions, *Brown v. Mitchell*, 327 F. Supp. 2d 615, 650 (E.D. Va. July 28, 2004); contaminated water, *Carroll v. DeTella*, 255 F.3d 470, 472 (7th Cir. 2001); compelled use of chemical toilets, *Masonoff v. DuBois*, 899 F. Supp. 782, 797 (D. Mass. Sep. 11, 1995), [and] paint toxins, *Crawford v. Coughlin*, 43 F. Supp. 2d 319, 325 (W.D.N.Y. 1999).” *Allen*, 2016 U.S. Dist. LEXIS 115024, 2016 WL 4613360, at \*8.

Perhaps most applicable to COVID-19, a number of cases have applied *Helling* to the exposure of inmates to Valley Fever in California. Relying on *Helling*, *Allen* *v. Kramer* concluded that an inmate plaintiff had alleged an Eighth Amendment violation because he was housed in the Central Valley where there was a relatively high risk of contracting Valley Fever. *See* *Allen*, 2016 U.S. Dist. LEXIS 115024, 2016 WL 4613360, at \*1, 11. *Shabazz* adopted *Allen*’s reasoning and came to the same conclusion. *Shabazz v. Beard*, 2018 U.S. Dist. LEXIS 31785, 2018 WL 1071173, at \*7-9 (E.D. Cal. Feb. 27, 2018); *see also* *Jackson v. California* 2014 U.S. Dist. LEXIS 22966, at \*32-38 (E.D. Cal. Feb. 20, 2014, No. 1:13-cv-01055-LJO-SAB) (overruled on other grounds in *Hines v. Youseff*, 914 F.3d 1218, 1231 (9th Cir. 2019) (explicitly declining to reach Eighth Amendment question but reversing on fact-specific finding of qualified immunity)).

The reasoning of *Allen* *v. Kramer*, *Shabazz v. Beard*, and *Jackson v. California*, and other cases applying *Helling* to exposure to environmental risks applies with equal or greater force to COVID-19, and establishes that officials who fail to adequately protect inmates from the risk of contracting COVID-19 violate the Eighth Amendment. Where protections from COVID-19 for incarcerated clients are insufficient, as in this case, whether for the jail population as a whole or for particularly at-risk individuals, release is constitutionally mandated.

Here, CLIENT NAME is housed at a facility that is unable to adequately protect HIS/HER from contracting the virus, and more importantly, places HIS/HER at a heightened risk of exposure due to the environmental conditions of the Lerdo Detention Facility. HIS/HER continued detention under these conditions violates the 8th Amendment, and necessitates HIS/HER immediately release pending containment of the virus.

1. ***Despite the Presumption for Remand under 18 U.S.C. § 3143(a)(2), Release is Warranted Due to the Exceptional Circumstances Presented by the COVID-19 Crisis.***

The Court must order detained any defendant who has been “found guilty of an[offense](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1548815702-833647311&term_occur=999&term_src=title:18:part:II:chapter:207:section:3143)in a case described in 18 U.S.C. 3142(f)(1)(A), (B), or (C)” while they await sentencing, absent a finding that the defendant is likely to prevail on a motion for acquittal or new trial, or the government does not seek a custodial sentence. 18 U.S.C. § 3143(a)(2). However, “A person subject to detention pursuant to section 3143(a)(2) . . . , and who meets the conditions of release set forth in section 3143(a)(1) . . . may be ordered released, under appropriate conditions, by the judicial officer, if it is clearly shown that there are exceptional reasons why such person’s detention would not be appropriate.” Section 3143(a)(1) of the same titles provides for release where the Court finds by “clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c).” 18 U.S.C. § 3143(a)(1).

While section 3145(c) address cases where the defendant appeals a detention order, the 9th Circuit has held that the district court has authority to determine whether there are “exceptional circumstances” warranting continued release notwithstanding section 3143(a)(2).  *See United States v. Garcia*, 340 F.3d 1013, 1014 n.1 (9th Cir. 2003) (“Although the ‘exceptional reasons’ provision appears in a subsection that otherwise concerns actions taken by appellate courts, we agree with the other circuits to have addressed the issue that the district court has authority to determine whether there are exceptional reasons.”).  In *Garcia*, the court noted that the “legal principles” were equally applicable to cases involving defendants seeking release pending sentencing as to defendants seeking bail pending appeal. *See* Id. at 1015 n.2.

Although there is little precedent in the 9th Circuit regarding what constitutes “exceptional reasons” for continued release notwithstanding section 3143(a)(2), the court in *Garcia* provided several examples, including “circumstances that would render the hardships of prison [or jail pending sentencing] unusually harsh for a particular defendant.” Id. at 1019. Specifically, the 9th Circuit recognized that release may be appropriate where “incarceration would impose exceptional risks on a defendant involving [her] physical or mental well-being.” Id. at 1020.

Here, exceptional reasons for CLIENT NAME’ short-term release pending sentencing are undeniably present. The threat posed to the jail population, and in particular to CLIENT NAME given HIS/HER age and condition, by COVID-19 renders the hardships of continued detention unusually harsh. Moreover, continued detention imposes an exceptional risk that CLIENT NAME will be exposed to carriers of the virus in an environment that can neither contain, adequately test for, or treat the virus, which poses a severe threat to CLIENT NAME physical and emotional wellbeing. Accordingly, upon a finding that conditions can be fashioned to mitigate the risk of flight and danger to the community, CLIENT NAME should be released for the short period leading up to HIS/HER sentencing hearing, which is set for May 8, 2020.

CLIENT NAME was previously released on a combination of conditions the court deemed sufficient, but not greater than necessary, to assure CLIENT NAME appearance as required and protect the community. CLIENT NAME substantially complied with those conditions, but for a breakdown in communication with HIS/HER supervising pretrial officer, resulting in the violation petition filed in November of 2018. Even after the petition was filed, CLIENT NAME was continued on release, subject to the added condition of location monitoring, with which HE/SHE complied without issue. CLIENT NAME has never failed to appear in court as required during the pendency of this case, and poses no future threat to any individual or HIS/HER community.

Indeed, if released, CLIENT NAME will be self-isolating in an approved residence while COVID-19 containment efforts continue and as HE/SHE awaits sentencing. HE/SHE will have less contact with the community than HIS/HER previous release, and only one additional court appearance. The risks of non-appearance and danger are less under these circumstances than ever, and CLIENT NAME is not requesting exceptions to home incarceration for employment or religious services that would bring HIS/HER into the community.

Even if the court determines that CLIENT NAME poses some risk of non-appearance or danger to the community, conditions can certainly be fashioned to ameliorate that risk. Katrina Lockett, a friend of CLIENT NAME who has known HIS/HER for more than 16 years, has offered HIS/HER residence as a place where CLIENT NAME can self-isolate and shelter in place, as recommended by the CDC. Ms. Lockett has also offered to serve as a third party custodian for CLIENT NAME. Ms. Lockett is gainfully employed as supervisor for the Financial Aid Department of Delta College in Stockton, CA, and is presently working remotely from HIS/HER home per social distancing guidelines. Ms. Lockett´s contact information and address has been provided to pretrial services for a determination of suitability in advance of the hearing on this motion.

1. **CONCLUSION**

Because there is new information that bears on the issue of whether CLIENT NAME’ short-term release is appropriate in response to the COVID-19 pandemic and in light of the foregoing health and safety concerns posed by incarceration at the Lerdo detention facility, the defense respectfully requests that the matter be set for a bail review hearing pursuant to 18 U.S.C. § 3142(f).

CLIENT NAME requests an order of short-term, temporary release subject to whatever conditions the Court deems appropriate, including location monitoring (home incarceration) and the appointment of a third-party custodian who will reside with CLIENT NAME. CLIENT NAME has previously complied with the location monitoring program, does not present of serious risk of flight nor a danger to the community, and is willing and able to abide by stringent conditions of release in order to ensure HIS/HER safety and the safety of other detainees and correctional staff during the COVID-19 crisis.

If the Court is unwilling to release CLIENT NAME in the short-term subject to conditions, defense counsel requests an order from this Court directing the United States Marshal to ensure the following life-saving safety measures are in place to protect CLIENT NAME (and other federal pretrial detainees) from the devastating impact of the virus:

1. The defendant shall be screened for symptoms of COVID-19 on a daily basis. If the defendant shows any signs or symptoms of COVID-19, a COVID-19 test kit shall be administered within 24 hours.
2. The defendant shall remain at least six feet away from any other person unless necessary to administer health care or in the course of an emergency.
3. The defendant shall not be housed in a room with any other person and shall not be transported in a vehicle that requires proximity to others of less than six feet.
4. The defendant shall be provided hygiene items, to include at a minimum: tissues, hand sanitizer containing at least 60% alcohol, disinfecting wipes, soap, disposable latex gloves and face masks.
5. All areas where the defendant is housed or transported shall be cleaned and disinfected prior to the defendant being housed or transported there. Afterward, whenever a person other than the defendant enters the area, the area shall be cleaned and disinfected.
6. The defendant's cell must be cleaned and disinfected every 24 hours, at a minimum, regardless of whether anyone else has entered the area. The defendant shall also be permitted to disinfect their own cell with disinfecting wipes.
7. The defendant's clothing, linens, towels and any other porous items they will contact shall be cleaned and disinfected daily.
8. The defendant shall be permitted to wash their hands regularly and thoroughly with an alcohol-based hand rub or soap and water.

Absent release to home incarceration, nothing short of the above-listed safety measures will be sufficient to protect CLIENT NAME from the life-threatening effect of COVID-19, which has reached pandemic levels in a matter of weeks.

Respectfully submitted,

HEATHER E. WILLIAMS

Federal Defender

Date: March 23, 2020 /s/ *ATTORNEY NAME*

ATTORNEY NAME

Assistant Federal Defender Counsel for Defendant

CLIENT NAME

1. A request for a waiver of appearance pursuant to Rule 43 will be filed separately and concurrently with this motion. [↑](#footnote-ref-1)
2. *Coronavirus Map: Tracking the Spread of the Outbreak*, N.Y. Times (March 18, 2020), https://nyti.ms/2U4kmud (updated regularly). [↑](#footnote-ref-2)
3. Taylor Telford, *U.S. markets surge as massive economic stimulus plan takes shape to offset coronavirus*, Wash. Post, (March 18, 2020) , https://www.washingtonpost.com/business/2020/03/17/us-stock-markets-today-fed-funds/. [↑](#footnote-ref-3)
4. Sheri Fink, *‘It’s Just Everywhere Already’: How Delays in Testing Set Back the U.S. Coronavirus Response*, N.Y. Times, (March 10, 2020), https://www.nytimes.com/2020/03/10/us/coronavirus-testing-delays.html. [↑](#footnote-ref-4)
5. Close contact is defined as: a) being within approximately 6 feet (2 meters) of a COVID-19 carrier for a prolonged period of time; close contact can occur between inmates while sharing a cell/pod or communal area such as a dining or bathing area with a COVID-19 carrier; b) having direct contact with infectious secretions of a COVID-19 carrier (e.g., being coughed on). [↑](#footnote-ref-5)
6. <https://www.medrxiv.org/content/10.1101/2020.03.09.20033217v1.full.pdf> [↑](#footnote-ref-6)
7. https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/plan-preparerespond.html [↑](#footnote-ref-7)
8. Hammett TM, Harmon MP, Rhodes W. The burden of infectious disease among inmates

   of and releases from US correctional facilities, 1997, *Am J Public Health*, 2002, vol. 92

   (pg. 1789-94). [↑](#footnote-ref-8)
9. Centers for Disease Control Prevention (CDC). Prevention and control of tuberculosis in

   correctional and detention facilities: recommendations from CDC, *MMWR Morb Mortal*

   *Wkly Rep*, 2006, vol. 55 (pg. 1-48). [↑](#footnote-ref-9)
10. Dober, G. Influenza Season Hits Nation’s Prisons and Jails. *Prison Legal News,* June,

    2018 (pg. 36) <https://www.prisonlegalnews.org/news/2018/jun/5/influenza-season-hits-nations-prisonsand-jails/>; Pandemic influenza and jail facilities and populations, Laura Maruschak, et. al., American Journal of Public Health, September 2009. [↑](#footnote-ref-10)
11. <https://bakersfieldnow.com/news/local/lerdo-releases-38-inmates-in-response-to-covid-19> [↑](#footnote-ref-11)