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OF NEW YORK, INC.**

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March 23, 2020

BY ECF

The Honorable Judge Paul A. Crotty
United States District Judge
Southern District of New York
500 Pearl Street
New York, NY 10007

**RE: United States v. Shakeil Chandler
19 Cr. 867 (PAC)**

Honorable Judge Crotty:

Shakeil Chandler respectfully moves the Court for an order granting his release or, in the alternative, a bail hearing to be held this week. Information now exists that was not known at the time of Mr. Chandler's last court appearance "that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of [Mr. Chandler] as required and the safety of the community." *See* 18 U.S.C. § 3142(f). If released, Mr. Chandler will return to his home in Brooklyn, where he resides with his mother and his three-year-old son, with electronic monitoring.

On March 4, 2020, defense counsel requested a bail hearing for Mr. Chandler. In response to counsel's letter motion, on March 9, 2020, Your Honor held a conference to hear counsel's concerns about violations of Mr. Chandler's Sixth Amendment right to counsel. While the Court declined to release Mr. Chandler on bail at that time, Your Honor directed the defense to bring it to the Court's attention if Mr. Chandler continued being denied access to counsel while incarcerated. I write now, requesting Mr. Chandler's immediate release from the Metropolitan Correctional Center (MCC) both in response to that instruction, and in light of the rapidly changing public health crisis that imperils Shakeil Chandler's physical health. *See* 18 U.S.C. § 3142(g)(3)(A) (listing a person's "physical and mental condition" as one of the release factors to be considered in a bail application).

I. The COVID-19 outbreak compels Mr. Chandler's release.

We are facing a serious and urgent public health crisis. On March 11, 2020, the World Health Organization officially classified COVID-19, a new strain of coronavirus, as a global

pandemic.¹ On January 21, 2020, Washington State announced the first confirmed case of coronavirus in the United States.² Only two months later, COVID-19 has infected over 33,018 people across the United States, leading to at least 428 deaths.³

The exponential rate of coronavirus infection is unparalleled. The first case of coronavirus in New York State was announced on March 1, 2020. Less than two weeks later, New York State reported 325 positive cases. To date, the state has amassed 15,168 confirmed cases of the virus, with 114 deaths.⁴ In a five-day period between March 15 and March 20, New York State experienced a 1,064% increase in new confirmed cases of COVID-19.⁵ As of March 21, 2020 in New York City, there are 8,115 positive cases and 60 deaths resulting from the virus.⁶ Ten days ago, New York City had only 53 confirmed cases.⁷ New York now has more confirmed cases of coronavirus than any other state in the country. In fact, New York has 5% of coronavirus cases nationwide.⁸ And the majority of those cases are in New York City, making it an epicenter of the pandemic.⁹

In response to this public health crisis, Governor Andrew Cuomo declared a State of Emergency in New York State on March 7, 2020.¹⁰ Mayor Bill de Blasio declared a State of Emergency in New York City on March 12, 2020, banning gatherings of over 500 people.¹¹ On March 20, 2020, Governor Cuomo directed all non-essential workers to work from home, requiring individuals to maintain 6 feet of distance between each other.¹² The same day, the

¹ *WHO Characterizes COVID-19 as a Pandemic*, World Health Organization (Mar. 11, 2020), at <https://bit.ly/2W8dwpS>.

² *First Patient With Wuhan Coronavirus Is Identified in the U.S.*, The New York Times (Jan. 21, 2020), at <https://www.nytimes.com/2020/01/21/health/cdc-coronavirus.html>.

³ *Coronavirus Map: Tracking the Spread of the Outbreak*, The New York Times (Mar. 21, 2020), at <https://nyti.ms/2U4kmud> (updating regularly).

⁴ *Id.*

⁵ *Watch How the Coronavirus Spread Across the United States*, The New York Times (Mar. 21, 2020), at <https://www.nytimes.com/interactive/2020/03/21/us/coronavirus-us-cases-spread.html>.

⁶ *Coronavirus*, New York City Health (Mar. 21, 2020), at <https://on.nyc.gov/39ME7wU> (updating regularly).

⁷ *Id.*

⁸ *Coronavirus Live Updates*, The New York Times (Mar. 22, 2020) at <https://www.nytimes.com/2020/03/22/world/coronavirus-updates-world-usa.html> (updating regularly).

⁹ *Coronavirus in N.Y.C.: Region Is Now an Epicenter of the Pandemic*, The New York Times (Mar. 23, 2020), at <https://www.nytimes.com/2020/03/22/nyregion/Coronavirus-new-York-epicenter.html?action=click&module=Spotlight&pgtype=Homepage>.

¹⁰ *At Novel Coronavirus Briefing, Governmor Cuomo Declares State of Emergency to Contain Spread of Virus*, New York State (Mar. 11, 2020) at <https://on.ny.gov/2TKzIoz>.

¹¹ *DeBlasio Declares State of Emergency in NYC, and Large Gatherings Are Banned*, The New York Times (Mar. 12, 2020).

¹² *Novel Coronavirus (COVID-19)*, New York State Department of Health (Mar. 21, 2020), at <https://on.ny.gov/2vfFQvy> (updating regularly).

Federal Emergency Management Agency (FEMA) declared New York “a major disaster.”¹³

While adults over sixty years old and people with chronic medical conditions are at heightened risk for COVID-19, young, otherwise healthy individuals are not immune from infection. Data from the Centers for Disease Control and Prevention (CDC) shows that nearly 40% of patients hospitalized from coronavirus were 20 to 54 years old.¹⁴ In New York, 18- to 49-year-olds comprise more than half of all cases in the state.¹⁵ With thousands of confirmed cases in New York City that indicate community spread, we must take every necessary action to protect vulnerable populations and the community at large.

a. Conditions of pretrial confinement create the ideal environment for the transmission of coronavirus.

“Prisons are petri dishes for contagious respiratory illnesses.”¹⁶ Inmates cycle in and out of Bureau of Prisons (BOP) pretrial facilities from all over the world and the country, and people who work in the facilities leave and return daily, without screening or testing. **On March 21, 2020, an inmate at Metropolitan Detention Center (MDC) tested positive for the coronavirus.**¹⁷ The individual “complained of chest pains on Thursday, a few days after he arrived at the facility.”¹⁸ When he first arrived at the facility, according to authorities, he was asymptomatic. The effect on the population at MDC remains to be seen, but as the chief physician at Rikers Island cautioned, “A storm is coming.”¹⁹

Given what we know about COVID-19, the BOP’s quest to contain the infection seems futile. Coronavirus is highly contagious. On average, one person with the coronavirus will infect

¹³ President Donald J. Trump Approves Major Disaster Declaration for New York, FEMA (Mar. 20, 2020), at <https://www.fema.gov/news-release/2020/03/20/president-donald-j-trump-approves-major-disaster-declaration-new-york>.

¹⁴ *Younger Adults Make Up Big Portion of Coronavirus Hospitalizations in U.S.*, The New York Times (Mar. 20, 2020), at <https://www.nytimes.com/2020/03/18/health/coronavirus-young-people.html>.

¹⁵ *Coronavirus Live Updates*, The New York Times (Mar. 22, 2020) at <https://www.nytimes.com/2020/03/22/world/coronavirus-updates-world-usa.html> (updating regularly).

¹⁶ *Letters to the Editor: A prison doctor’s stark warning on coronavirus, jails and prisons*, Los Angeles Times (Mar. 20, 2020), at <https://www.latimes.com/california/story/2020-03-20/prison-doctors-stark-warning-on-coronavirus-and-incarceration>. See also Joseph A. Bick (2007). Infection Control in Jails and Prisons. *Clinical Infectious Diseases* 45(8):1047-1055, at <https://doi.org/10.1086/521910>.

¹⁷ *1st fed inmate tests positive for coronavirus*, A.P. News (Mar. 21, 2020), at <https://apnews.com/ec49cc7f4d1b00bc5010dfb6d935e042>.

¹⁸ *Id.*

¹⁹ *‘A Storm Is Coming’: Fears of an Inmate Epidemic as the Virus Spreads in the Jails*, The New York Times (Mar. 21, 2020), at <https://www.nytimes.com/2020/03/20/nyregion/nyc-coronavirus-rikers-island.html>.

between two to three other individuals.²⁰ But public health experts agree that incarcerated individuals “are at special risk of infection, given their living situations,” and “may also be less able to participate in proactive measures to keep themselves safe;” “infection control is challenging in these settings.”²¹

Internationally, prisons have proven ripe for the rapid spread of COVID-19. In China, officials confirmed 500 cases of coronavirus in prisons.²² Courts across Iran have granted 54,000 inmates furlough as part of the measures to contain coronavirus across the country.²³ Secretary of State Mike Pompeo has called for Iran to release Americans detained there because of the “deeply troubling” “[r]eports that COVID-19 has spread to Iranian prisons,” noting that “[t]heir detention amid increasingly deteriorating conditions defies basic human decency.”²⁴

On March 20, 2020, the New York City Department of Correction announced that one inmate and seven staff members in the city jails had been diagnosed with coronavirus.²⁵ One day later, on March 21, 2020, it became clear that no fewer than 38 people have tested positive.²⁶ At least 58 additional people are being held in contagious disease and quarantine units in the city’s jail system.²⁷ But the cases are not abating. The chairwoman of the New York City Board of Correction urged, “The best path forward to protecting the community of people housed and working in the jails is to rapidly decrease the number of people housed and working in them.”²⁸

b. The MCC remains unprepared for a coronavirus outbreak.

Inmates at the MCC—a massive pretrial detention facility housing approximately 700

²⁰ *The average coronavirus patient infects at least 2 others, suggesting the virus is far more contagious than flu*, Business Insider (Mar. 17, 2020), at <https://www.businessinsider.com/coronavirus-contagious-r-naught-average-patient-spread-2020-3>.

²¹ “Achieving A Fair And Effective COVID-19 Response: An Open Letter to Vice-President Mike Pence, and Other Federal, State, and Local Leaders from Public Health and Legal Experts in the United States,” (Mar. 2, 2020), at <https://bit.ly/2W9V6oS>.

²² Rhea Mahbubani, *Chinese Jails Have Become Hotbeds of Coronavirus As More Than 500 Cases Have Erupted, Prompting the Ouster of Several Officials*, Business Insider (Feb. 21, 2020), at <https://bit.ly/2vSzSRT>.

²³ Claudia Lauer and Colleen Long, *US Prisons, Jails On Alert for Spread of Coronavirus*, The Associated Press (Mar. 7, 2020), at <https://apnews.com/af98b0a38aaabedbc059092db356697>.

²⁴ Jennifer Hansler and Kylie Atwood, *Pompeo calls for humanitarian release of wrongfully detained Americans in Iran amid coronavirus outbreak*, CNN (Mar. 10, 2020), at <https://cnn.it/2W4OpV7>.

²⁵ *38 positive for coronavirus in NYC jails, including Rikers*, ABC News (Mar. 21, 2020), at <https://abcnews.go.com/US/wireStory/38-positive-coronavirus-nyc-jails-including-rikers-69731911>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

people—are at serious risk of contracting the virus.²⁹ The medical care at the MCC has repeatedly failed to adequately address even routine medical conditions, including for Shakeil Chandler himself,³⁰ in times of crisis, the medical care at the facility has halted entirely.³¹

On March 13, 2020, nearly two weeks after the first confirmed case of coronavirus in New York State, the Bureau of Prisons announced a 30-day suspension of all visits to all federal correctional facilities. But prohibiting visits to correctional facilities is insufficient to stem the spread of illness. “[T]here is no way to stop the daily flow of guards, teachers, food service and healthcare workers. Someone is certain to bring the virus in and take it back out while they are asymptomatic.”³²

Because there is currently no vaccine or cure for COVID-19, the primary focus is on preventing the spread of the virus. To prevent new infections, the CDC strongly recommends the following actions: thorough and frequent handwashing, cleaning surfaces with Environmental Protection Agency approved disinfectants, keeping at least 6 feet of space between people, and social distancing.³³

To date, the MCC has not met even the most basic recommendations of the CDC for preventing the spread of coronavirus. Maintaining six feet of distance from other inmates is all but impossible in a correctional facility where most individuals, including Shakeil Chandler, are double-bunked in a single cell, sharing a toilet and sink with a cellmate and a common shower with at least sixteen other people. In the days since March 13, the MCC has issued hand soap to inmates in Mr. Chandler’s housing unit only two times. Because commissary is currently closed, this soap must be used not only for handwashing, but also for showers and washing clothing; no one is allowed to purchase additional soap.

In addition to unhygienic living conditions, frequent movement between units at the

²⁹ See Exhibit A, Affidavit of Jonathan Giftos, M.D.

³⁰ E.g., *National Association of Women Judges (NAWJ) Women in Prison Committee (WIP) Second Visit to BOP’s Metropolitan Detention Center (MDC), Brooklyn, New York, June 3, 2016*, at <https://bit.ly/39JRhdW>. Since he was first incarcerated in November 2019, Mr. Chandler has repeatedly encountered difficulty receiving necessary medical attention, notwithstanding multiple requests to the MCC Legal Department.

³¹ During a recent eight-day lockdown at the MCC, inmates on one unit reported having been forced to share one toilet, one shower, and one sink among twenty-six people, and were prevented from washing their clothing: prime conditions for the spread, rather than containment, of infectious disease. On other units, toilets overflowed in two-man cells, spreading raw sewage. Inmates with serious medical conditions, including AIDS and anemia, were denied medications or medical care. Female inmates were denied feminine hygiene supplies. No clean drinking water was provided; inmates were forced to drink from their bathroom sinks, from which brown water often ran.

³² *Letters to the Editor: A prison doctor’s stark warning on coronavirus, jails and prisons*, Los Angeles Times (Mar. 20, 2020), at <https://www.latimes.com/california/story/2020-03-20/prison-doctors-stark-warning-on-coronavirus-and-incarceration>.

³³ Exhibit A, Affidavit of Jonathan Giftos, M.D.

MCC over the past several weeks promises to aid the spread of the virus. In New York City jails, where there have been at least 38 confirmed cases of coronavirus, the Board of Correction chairwoman stated, “It is likely that these people have been in hundreds of housing areas and common areas over recent weeks and have been in close contact with many other people in custody and staff.”³⁴ The MCC will encounter the same obstacle to cabining the spread. For eight days at the end of February through the beginning of March, the MCC was on total lockdown. During that period, inmates—including Mr. Chandler—report that they were frequently shuttled among various housing units as officers searched for a loaded gun. This movement promises to facilitate infection at the MCC.

The MCC’s solution to curtailing all visits for 30 days—providing additional phone minutes at no charge—presents yet another public health hurdle. The MCC has given each inmate an additional 200 phone minutes, bringing the total to 500 minutes. But with the extra phone time comes swarms of crowds. The phones in Mr. Chandler’s unit remain in constant use and are poorly cleaned, creating more opportunity to spread infection.

With each additional arrest comes increased risk of spreading the virus in MCC. Individuals who are newly arrested and potentially exposed to coronavirus, if they are not symptomatic, will be brought into the facility. There, they are held with the existing population, potentially transmitting COVID-19 to a populace held in close quarters with unsanitary conditions. These conditions are ripe for the spread of infection: The individual who tested positive for coronavirus at the MDC on March 21 first became incarcerated only a few short days before becoming symptomatic.³⁵

Notwithstanding a confirmed case of coronavirus at MDC, the MCC remains unprepared for an outbreak. The facility does not currently have the ability to test for coronavirus and there are no general screening protocols in place. Only if an inmate self-reports symptoms will they be screened for the virus. If symptomatic, the inmate will be “isolated” in their cell, exposing their cellmate to risk. The MCC has only thirty N-95 masks and no one, including correction officers, is allowed to have hand sanitizer because it is alcohol based. The use of gloves remains discretionary among officers.

Given what we know about coronavirus, conditions of confinement generally, and the lack of preparedness at the MCC, the fact that there are no confirmed cases of COVID-19 to date at the MCC reflects the fact that the MCC lacks the ability to test for the virus. It does not mean that no one in the facility is infected.

c. The federal judiciary has begun to set bail conditions for previously detained individuals in light of the coronavirus.

³⁴ 38 positive for coronavirus in NYC jails, including Rikers, ABC News (Mar. 21, 2020), at <https://abcnews.go.com/US/wireStory/38-positive-coronavirus-nyc-jails-including-rikers-69731911>.

³⁵ 1st fed inmate tests positive for coronavirus, A.P. News (Mar. 21, 2020), at <https://apnews.com/ec49cc7f4d1b00bc5010dfb6d935e042>.

The judiciary has recently begun to recognize and address this exceptional crisis. On March 12, 2020, Magistrate Judge Orenstein denied a remand application, holding that increasing the population of the Metropolitan Detention Center could present a “danger to the community”—the staff and inmates inside the jail—by potentially bringing the virus into the facility. *United States v. Raihan*, 20-CR-68 (BMC) (Mar. 12, 2020). A week later, conditions worsened exponentially.

On March 19, 2020, thirteen days after having remanded defendant Dante Stephens, Judge Nathan reversed herself “in light of circumstances that have changed since the March 6 hearing,” namely, “the unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic.” *United States v. Stephens*, 15-CR-95 (AJN) (Mar. 19, 2020). In setting bail, Judge Nathan noted that “[a] comprehensive view of the danger the Defendant poses to the community requires considering all factors,” including COVID-19. *Id.* Similarly, on March 19, 2020, the threat of coronavirus led Judge Ramos to release a formerly detained individual on bail. *See United States v. Santiago Ramos*, 20-CR-04 (ER).

In the throes of this public health crisis, the Court must release Shakeil Chandler to protect his physical health.

II. The Sixth Amendment demands Mr. Chandler’s release.

The conditions of confinement at the MCC have gutted Shakeil Chandler’s Sixth Amendment right to the effective assistance of counsel. Until he is released, Mr. Chandler will continue to suffer violations of his constitutional rights.

The Sixth Amendment right to counsel is the cornerstone of our adversarial system of criminal justice. “The right to consult with legal counsel about being released on bond, entering a plea, negotiating and accepting a plea agreement, going to trial, testifying at trial, locating trial witnesses, and other decisions confronting the detained suspect, whose innocence is presumed, is a right inextricably linked to the legitimacy of our criminal justice system.” *Federal Defenders of New York, Inc. v. Bureau of Prisons*, Docket No. 19-1778 (2d. Cir. Mar. 20, 2020). In recognition of this vital right, BOP regulations instruct that detention center wardens “*shall provide* the opportunity for pretrial inmate-attorney visits on a seven-days-a-week basis.” 28 C.F.R. § 551.117(a) (emphasis added).

A detention facility therefore violates the Sixth Amendment when it “unreasonabl[y] interfere[s] with the accused person’s ability to consult counsel.” *Benjamin v. Fraser*, 264 F.3d 175, 185 (2d Cir. 2001). Unreasonable interference requires a showing far less alarming than the one present here. In *Benjamin*, the Second Circuit held that New York City correctional facilities violated the right to counsel when defense attorneys “routinely face[d] unpredictable, substantial delays in meeting with clients” and were “forced to wait between 45 minutes and two hours, or even substantially longer, after arriving at a facility to see a client.” 264 F.3d at 179. These circumstances, where the Second Circuit refused to dissolve a consent decree providing judicial supervision of legal visitation in City correctional facilities, are far less jarring than those Mr. Chandler has been forced to endure.

For more than a month, Mr. Chandler has borne a complete disruption of his right to counsel. On February 27, 2020, the MCC entirely shut its doors to legal and social visitation for eight straight days. During that time, Mr. Chandler was confined to a single jail cell 24 hours a day. He, like all inmates, was denied phone calls to his attorney and lacked computer access for more than a week. When he was finally able to meet with counsel at the MCC on March 6, the visit occurred not in the regular counsel visit room, but in the social visit area. In this open space, where other inmates and their counsel sat mere feet away, Mr. Chandler was deprived a private, privileged conversation with counsel. This is inconsistent with the constitutional right to counsel. In *Wolfish v. Levi*, the Second Circuit held that the MCC “severely constrained” an inmate’s “access to legal counsel” where dedicated attorney visiting hours were limited to two hours a day, and most attorney visits were “made in the general visiting rooms during visiting hours thereby entailing long delays, limiting the attorney’s time with his client, and totally vitiating confidentiality.” 573 F.2d 118, 133 (2d Cir. 1978) (holding the), *rev’d on other grounds*, 441 U.S. 520 (1979).

In all of March, there was a brief, three-day window during which counsel could communicate with clients in person. On March 10, 2020, the MCC reopened for counsel visits. Three days later, on Friday, March 13, in response to the public health crisis posed by COVID-19, the BOP issued a notice that all visits in all federal correctional facilities would be suspended for at least 30 days. On March 19, defense counsel for Mr. Chandler emailed the MCC Legal Department to request a phone call with Mr. Chandler. The next day, defense counsel followed up with a request to meet with Mr. Chandler in person or by video conference. To date, the BOP has not responded to either of counsel’s requests. And there is no reason to believe the request for an in-person attorney visit will be granted. Since the suspension of counsel visits on March 13, the MCC reports that it has not received a single request from any defense counsel that they deem appropriate for an in-person visit.

In addition to being unable to meet with counsel in person, Mr. Chandler has suffered a complete inability to review critical discovery in preparation for trial. For the past month, the Government has continued producing discovery in Mr. Chandler’s case. Days before the lockdown at MCC, on February 24, 2020, the Government turned over supplemental discovery in Mr. Chandler’s case. **This production included a letter with two disclosures pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) that directly undercut the prosecution’s theory of the case and provide evidence that Mr. Chandler did not possess a firearm, the sole count on the indictment.** Additional lab reports disclosed by the government in this production further support this conclusion. The production also included a CD with multiple surveillance videos of the incident. More recently, on March 9, 2020, the Government produced audio recordings of 911 calls relevant to Mr. Chandler’s case. Upon receipt of each new set of production, defense counsel mailed the discovery to Mr. Chandler. Defense counsel also requested the Government send Mr. Chandler all of the discovery it has produced in his case. To date, Mr. Chandler has not received all of his discovery.

Even assuming Mr. Chandler eventually receives his discovery, the conditions at the MCC prevent Mr. Chandler from evaluating those materials. The supplemental discovery includes multiple surveillance videos and 911 calls, which require a computer to review. But Mr. Chandler does not have access to a computer to review discovery. In fact, Mr. Chandler has not

had access to the law library at the MCC since February 19, 2020. The legal computer on his unit, 5 South, was destroyed during the lockdown. Now, in the face of the coronavirus outbreak, the law library functions simultaneously as the educational department and the general library, with a limited capacity of fifteen inmates. Mr. Chandler has spoken with his unit counselor about his legal needs, but has received no assurances of when he will regain access to a computer outfitted to review discovery. And because his counsel visits have been suspended until at least April 12, 2020, he cannot use the computers in the legal visiting room to review his discovery.

Further, in the likely event that someone at the MCC tests positive for coronavirus, the entire facility will go on a total lockdown as it did in February, further inhibiting Mr. Chandler's constitutional rights. At MDC, immediately after an inmate tested positive for the coronavirus on March 21, 2020, the facility went on lockdown indefinitely: No inmates are allowed into or out of the building for any reason, including court appearances. Certainly we can expect this will be the case when a COVID-19 case is confirmed at the MCC. That event will mark the complete evisceration of Mr. Chandler's right to counsel.

As the public health crisis rapidly evolves, so too does the judiciary's perspective on release. On March 18, 2020, Chief Judge McMahon granted an application for bail based on compelling reasons related to the current health crisis. Defense counsel had argued that "[a] complete cessation of visits at this critical time of preparation would make it impossible to adequately prepare for trial..." *United States v. Hudson*, 19-CR-496 (CM) (Mar. 13, 2020). Five days earlier, she had denied the request. *Id.*

Mr. Chandler remains innocent until proven guilty. To mount an effective defense at trial, Mr. Chandler must be released from custody. This extraordinary moment requires judicial intervention to safeguard Mr. Chandler's constitutional rights.

III. The Bail Reform Act requires Mr. Chandler's temporary release.

When an individual is in custody, the Bail Reform Act "permit[s] the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason." 18 U.S.C. § 3142(i). There is no greater necessity for the preparation of a "person's defense" than access to counsel. And there is no more "compelling reason" than a person's physical health.

Indeed, Judge Nathan recognized that "the obstacles the current public health crisis poses to the preparation of the Defendant's defense constitute a compelling reason [to release the Defendant] under 18 U.S.C. § 3142(i)." *United States v. Stephens*, 15-CR-95 (AJN) (Mar. 19, 2020) (releasing the defendant concluding that in light of changed circumstances, Mr. Stephens does not pose a danger to the community). *See also United States v. Perez*, 19-CR-297 (PAE) (Mar. 19, 2020) (concluding "compelling reasons exist for temporary release of the defendant from custody during the current public health crisis").

In *United States v. Rodriguez*, the Court held that with respect to an accused's need to consult with counsel, "Section 3142(i)(3) reaches above the minimum" standards set by the Sixth

Amendment. 2014 WL 4094561, at *4 (W.D.N.Y. 2014) (Scott, M.J.). The subsection’s plain text “mandates the removal of any impediment to ‘private consultations’ [between attorney and client] that are qualitatively and quantitatively ‘reasonable.’” *Id.*; *cf. Falcon v. U.S. Bureau of Prisons*, 52 F.3d 137, 139 (7th Cir. 1995) (“Section 3142(i)(3) is designed to protect a defendant’s Sixth Amendment right to counsel, and if that right is being infringed, [the court] has the statutory authority to protect [defendant’s] access to counsel.”).

At the very least, the Bail Reform Act demands that Mr. Chandler be released for the duration of the coronavirus outbreak.

Conclusion

The Court cannot ignore the restriction of Mr. Chandler’s constitutional right to counsel and the substantial threat incarceration poses to Mr. Chandler’s physical well-being. As the Second Circuit recently opined, “the careful balancing of needs and rights that [] emergencies require is likely not best achieved by protracted and contentious litigation after the fact, and certainly not at the appellate level. It requires real-time, comprehensive solutions, reached in cooperative institutional discussions.” *Federal Defenders of New York, Inc. v. Bureau of Prisons*, Docket No. 19-1778 (2d. Cir. Mar. 20, 2020) (“direct[ing] the District Court [to help] ensure that the Federal Defenders have meaningful, continuous access to their clients either in person or by remote access pending adjudication of [legal claims against the MDC, including Sixth Amendment violations] as these claims may be amended to address similar issues of access [to counsel] arising during the current public health emergency [COVID-19]”).

Accordingly, I respectfully request that the Court issue an order releasing Shakeil Chandler on bail. In the alternative, I respectfully request a bail hearing this week for Mr. Chandler.

Thank you for your consideration of this matter.

Respectfully submitted,

/s/

Marne Lenox
Assistant Federal Defender
(212) 417-8721

cc: AUSA Jun Xiang (by e-mail)

EXHIBIT A

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APPLICATION OF VULNERABLE
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INMATE FOR RELEASE FROM MCC
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**AFFIDAVIT OF JONATHAN
GIFTOS, M.D.**

I, Jonathan Giftos, hereby affirm as follows:

1. I am a doctor duly licensed to practice medicine in the State of New York. I am board certified in internal medicine and addiction medicine.
2. I am currently the Medical Director, Addiction Medicine & Drug User Health at Project Renewal and a Clinical Assistant Professor in the Department of Medicine at Albert Einstein College of Medicine. I was previously the Clinical Director of Substance Use Treatment for NYC Health & Hospitals, Division of Correctional Health Services at Rikers Island. In that capacity, I was responsible for the diversion, harm reduction, treatment and reentry services for incarcerated patients with substance use disorders. I further served as the medical director of the Key Extended Entry Program (KEEP), the nation's oldest and largest jail-based opioid treatment program that provides methadone and buprenorphine to incarcerated patients with opioid use disorders. I successfully led an effort to remove non-clinical barriers to opioid treatment program enrollment in 2017, which dramatically expanded treatment access from 25% to over 80%, while also reducing post-release mortality for people with opioid use disorder.

3. I have extensive experience working with vulnerable populations such as the incarcerated and those experiencing homelessness.

4. I submit this affidavit in support of vulnerable defendants' (as defined by the CDC) Motion for Temporary Release from Custody during the COVID-19 pandemic.

I. Coronavirus Epidemic in New York City

5. On March 11, 2020, the World Health Organization declared that the rapidly spreading outbreak of COVID-19, a respiratory illness caused by a novel coronavirus, is a pandemic, announcing that the virus is both highly contagious and deadly.¹ To date, the virus is known to spread from person-to-person through respiratory droplets, close personal contact, and from contact with contaminated surfaces and objects.² The CDC also warns of "community spread" where the virus spreads easily and sustainably within a community where the source of the infection is unknown.³ Experts are still learning how it spreads.

6. As of March 18, 2020, novel coronavirus has infected over 193,475 people, leading to 7,864 deaths worldwide.⁴ In the United States, there are at least 5,881 confirmed cases and there have been at least 107 deaths.⁵ There are confirmed coronavirus cases in every state, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands.

¹ World Health Organization, Media Briefing on March 11, 2020: <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

² Centers for Disease Control and Prevention, Coronavirus Disease 2019: *How it Spreads*, <https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html>

³ *Id.*

⁴ *Novel Coronavirus Situation Dashboard*, World Health Organization <https://experience.arcgis.com/experience/685d0ace521648f8a5beeeee1b9125cd>.

⁵ *Coronavirus Map: Tracking the Spread of the Outbreak*, The New York Times (March 18, 2020), at <https://nyti.ms/2U4kmud> (updating regularly).

7. Governor Cuomo declared a State of Emergency in New York State on March 7, 2020. Mayor De Blasio declared a State of Emergency in New York City on March 12, 2020. As of March 18, 2020, there are 2,382 positive cases in New York State with 1,339 of those cases being in New York City.⁶ Among the positive cases in New York City are a number of people who work in courthouses, law enforcement, legal offices, and the medical field, increasing the likelihood of exposure to and by inmates: a security officer and an agent in the U.S. Attorney's Office, SDNY;⁷ a NYC Department of Corrections investigator (who has died from the virus);⁸ a lawyer with an office in Midtown Manhattan (and his wife and son);⁹ a healthcare worker in Manhattan; an attorney and legal intern in local New York State courts; and an attorney at the Brooklyn Supreme Court.¹⁰

8. There is currently no vaccine or cure. The primary focus is on preventing the spread of the virus at this juncture. To prevent new infections, the Centers for Disease Control and Prevention strongly recommend the following actions: thorough and frequent handwashing, cleaning surfaces with EPA approved disinfectants, keeping at least 6 feet of space between people,

⁶ *Information on Novel Coronavirus*, New York Department of Health, <https://www.health.ny.gov/diseases/communicable/coronavirus> (last visited March 17, 2020).

⁷ Email Communication with Edward Tyrrell, U.S. Attorney's Office, SDNY (March 14, 2020).

⁸ *NYC Corrections Officer Dies of Coronavirus*, <https://www.pix11.com/news/coronavirus/nyc-correction-officer-dies-of-coronavirus>

⁹ *Midtown Lawyer, Family and Friends Test Positive*, <https://www.nbcnewyork.com/news/local/nyc-attorney-in-critical-condition-city-works-to-trace-movements-awaits-more-tests/2311723/>

¹⁰ *Information about Coronavirus and New York State Courts*, <https://www.nycourts.gov/whatsnew/covid.shtml>; see also *Two People with Coronavirus were in Manhattan and Brooklyn Courts*, <https://twonews.us/us-news/two-people-with-coronavirus-were-in-manhattan-brooklyn-courts>.

and avoiding group settings.¹¹ Social distancing has also been encouraged to slow the rate of COVID-19 infections so that hospitals have the resources to address infected individuals with urgent medical needs.¹² The President's *Coronavirus Guidelines for America*, to slow the spread of the coronavirus, warns that social gatherings in groups of more than 10 people should be avoided.¹³ In correctional settings, such sanitation, social distancing, and self-quarantining measures are nearly impossible especially when inmates are routinely shackled and escorted with other prisoners.¹⁴

Certain Identifiable Populations Are Far More Vulnerable To COVID-19 Than The Population At Large Is.

9. The Centers for Disease Control have identified two groups of people at higher risk of contracting and succumbing to COVID-19: adults over 60 years old and people with chronic medical conditions.¹⁵

10. COVID-19 is more dangerous to persons in these high-risk groups than to the general population. Older people who contract COVID-19 are more likely to die than people under the age of 60. In a February 29th WHO-China Joint Mission Report, the preliminary mortality rate analyses showed that individuals age 60-69 had an overall 3.6% mortality rate and those 70-79

¹¹ *How to Protect Yourself*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/prepare/prevention.html>.

¹² *Coronavirus, Social Distancing, and Self-Quarantine*, Johns Hopkins Medicine, <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-social-distancing-and-self-quarantine>.

¹³ *The President's Coronavirus Guidelines for America*, https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf.

¹⁴ *See We Are Not a Hospital: A Prison Braces for the Coronavirus*, New York Times, March 18, 2020, <https://www.nytimes.com/2020/03/17/us/coronavirus-prisons-jails.html>.

¹⁵ *If You Are at Higher Risk*, Centers for Disease Control and Prevention, <https://tinyurl.com/vtbebzc>; see also *Report of the WHO-China Joint Mission on Coronavirus Disease (COVID-19)*, <https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf> at 12.

years old had an 8% mortality rate.¹⁶ For individuals 40 years and younger, the mortality rate was as low as .2%. It has been found that older people diagnosed with COVID-19 are more likely to be very sick and require hospitalization to survive because the acute symptoms include respiratory distress, cardiac injury, arrhythmia, septic shock, liver dysfunction, kidney injury and multi-organ failure. Access to a mechanical ventilator is often required. People with chronic medical conditions (no matter their age) are also at significantly greater risk from COVID-19 because their already-weakened systems are less able to fight the virus. These chronic medical conditions include lung disease, cancer, heart failure, cerebrovascular disease, renal disease, liver disease, diabetes, immunocompromising conditions, and pregnancy. Those with pre-existing medical conditions have a higher probability of death if infected. The WHO-China Joint Mission Report provides that the mortality rate for those with cardiovascular disease was 13.2%, 9.2% for diabetes, 8.4% for hypertension, 8.0% for chronic respiratory disease, and 7.6% for cancer.¹⁷

In a March 17th *Washington Post* article tracking the 100 United States COVID-19 deaths, it is reported that many of the fatalities had underlying medical conditions, which made it harder for their bodies to fight off COVID-19. And nearly all — about 85 percent — were older than 60; about 45 percent were older than 80.¹⁸

Correctional Settings Increase The Risk Of Transmission

11. Correctional settings increase the risk of contracting an infectious disease, like COVID-19, due to the high numbers of people with chronic, often untreated, illnesses housed in a

¹⁶ *Age, Sex, Existing Conditions of COVID-19 Cases and Deaths Chart*, <https://www.worldometers.info/coronavirus/coronavirus-age-sex-demographics/> (data analysis based on WHO-China Joint Mission Report, *supra*).

¹⁷ *Report of the WHO-China Joint Mission on Coronavirus Disease (COVID-19)*, <https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf> at 12.

¹⁸ *U.S. Coronavirus Death Toll Reaches 100*, The Washington Post, March 17, 2020, at https://www.washingtonpost.com/national/us-coronavirus-death-toll-reaches-100/2020/03/17/f8d770c2-67a8-11ea-b313-df458622c2cc_story.html.

setting with minimal levels of sanitation, limited access to personal hygiene, limited access to medical care, and no possibility of staying at a distance from others. Correctional facilities house large groups of inmates together, and move inmates in groups to eat, do recreation, and go to court. They frequently have insufficient medical care for the population, and, in times of crisis, even those medical staff cease coming to the facility. Hot water, soap and paper towels are frequently in limited supply. Inmates, rather than professional cleaners, are responsible for cleaning the facilities and often not given appropriate supplies. This means there are more people who are susceptible to getting infected all congregated together in a context in which fighting the spread of an infection is nearly impossible.

12. Outbreaks of the flu regularly occur in jails, and during the H1N1 epidemic in 2009, many jails and prisons dealt with high numbers of cases.¹⁹

13. Inmates in New York City have already begun to test positive for COVID-19.²⁰ An inmate at Rikers and an inmate at Nassau County Correctional Facility (which houses both state and federal pre-trial detainees) tested positive this week.²¹ A corrections officer at Rikers has also tested positive.²²

¹⁹ *Prisons and Jails are Vulnerable to COVID-19 Outbreaks*, The Verge (Mar. 7, 2020) at <https://bit.ly/2TNcNZY>.

²⁰ *Rikers Island Inmate Tests Positive for Coronavirus, in a First for New York City*, New York Magazine (March 18, 2020).

²¹ *Id.*; *Nassau County Jail Inmate Tests Positive*, <https://www.pix11.com/news/coronavirus/inmate-at-nassau-county-jail-long-island-tests-positive-for-coronavirus-officials>.

²² *Rikers Island Inmate Tests Positive for Coronavirus, in a First for New York City*, New York Magazine (March 18, 2020).

Specific Conditions At MCC New York

14. Based on my understanding of the specific conditions at the federal pre-trial detention center in Manhattan (“MCC”) as contained in published reports and communicated to me by Deirdre D. von Dornum, Attorney-in-Charge of the Federal Defenders of New York, these conditions pose heightened risks to already vulnerable inmates of contracting the novel coronavirus and of developing acute symptoms from the virus.

15. The size of the population and the conditions of confinement at MCC increase the risk of infection substantially, because it is impossible for inmates to maintain a 6-foot distance from others, to avoid large groups, or to implement sufficient hand-washing and sanitization of surfaces.

a. Approximately 750 inmates are held at the MCC, at least 10% of whom (and likely a higher percentage) fall into the high risk groups identified by the CDC.²³ The facility was designed to hold only 474 inmates.²⁴

b. New inmates arrive at MCC from all over the world each week. The pace of new incarcerations has not slowed despite the coronavirus. These new inmates, who have been living in the community as coronavirus spreads, are screened only for fever and recent travel to designated hotspot countries before joining the general population of inmates.²⁵

c. Correctional officers who live in New York, New Jersey, and Pennsylvania come in and out of the facility each day without medical screening.²⁶ Significantly, in a March

²³ Statement of Warden Licon-Vitale (March 12, 2020) (approximately 10% of inmates at MCC are high-risk for COVID-19 within the CDC’s definition).

²⁴ *The Real Scandal at the MCC*, The Atlantic (Aug. 16, 2019).

²⁵ *Id.*

²⁶ *Id.*

18th CDC report, an epidemiological investigation revealed that coronavirus-infected staff members contributed to the outbreak in a nursing home facility with ineffective infection control and prevention and staff members working in multiple facilities.²⁷ The Seattle nursing home outbreak demonstrates that individuals with underlying health conditions and advanced age, in a shared location, are at a high risk of death, especially when resources and staffing become inadequate.²⁸

d. Male inmates in the general population at MCC are housed either in small two-man cells (originally designed for single occupancy) with a single shared toilet and sink or in large open dormitory units housing approximately 30 inmates with shared toilets and sinks. The windows in the cells do not open. Recreation on the roof is available for at most one hour a day. In the wake of a recent lockdown preceding the COVID-19 lockdown, one of only two toilets on a dormitory unit was broken, leaving over 25 men to share a single toilet and two sinks.

e. There is a small unit for approximately 30 female inmates, who are housed in two-woman cells with a shared sink and toilet. No outside recreation is available to female inmates at MCC. The windows on the unit do not open. Several of the female inmates have chronic medical conditions.

f. During the preceding lockdown, the MCC housing units were not cleaned for two weeks because the inmates, who are responsible for cleaning the institution, were locked in their cells.²⁹ In addition, there was no laundry available, and inmates were forced to

²⁷ *COVID-19 in a Long-term Care Facility—King County Washington, February 27-March 9, 2020*, <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6912e1-H.pdf>.

²⁸ *Id.*

²⁹ Statement of Warden Licon-Vitale at SDNY Meeting on BOP and Coronavirus (March 12, 2020).

sleep on the same sheets and wear dirty clothes for the entire period.³⁰ Female inmates who were menstruating were denied sanitary napkins or other feminine hygiene items and forced to wear a single pair of underwear for the entire two week period.

g. No hand sanitizer is currently available to inmates at MCC.³¹

h. Tissues are not readily available. Inmates use toilet paper to blow their noses. Each inmate is provided only one roll of toilet paper per week.

i. Each inmate is given one small bar of soap a week, at most³². Access to additional soap is limited to those inmates who have sufficient commissary funds to purchase it, and dependent on the commissary being open; it is routinely closed during lockdowns.³³

j. Inmates prepare all inmate meals and this meal preparation, with the exception of kosher and halal meals, is performed in a single kitchen.

k. Inmates eat meals in large groups.

l. Inmates are responsible for sanitizing the housing unit common areas, and frequently lack adequate cleaning supplies to do so.

m. Inmates have not been informed of the symptoms of COVID-19, or of how to prevent the spread of the infection.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

n. The facility has not informed the inmate population of what the protocol will be for symptomatic inmates;³⁴ absent a transparent protocol, inmates in correctional settings often fear they will be confined in solitary if they volunteer that they are symptomatic.

16. Inmates at MCC who do contract COVID-19 are at higher risk for developing acute symptoms than if they were in the community, because MCC lacks the medical resources to care for symptomatic inmates.

- a. There is no separate medical unit or facility for ill inmates.³⁵ Unlike many Federal Correctional Institutions and even Rikers' Island, MCC has no physical space in which an ill inmate can convalesce that is separate from other inmates, warm, clean and has access to fresh water and regular hand-washing.
- b. On weekdays, there are only two doctors regularly available at MCC to care for all 750 inmates. Even this highly limited number is likely to decrease as doctors themselves go into quarantine. Neither of these doctors specialize in infectious diseases.
- c. There are no doctors at MCC on weekends or evenings.
- d. People who contract COVID-19 can deteriorate rapidly, even before a test result can be received. They need constant monitoring. Most people in the higher risk categories will require more advanced support: positive pressure ventilation, and in extreme cases, extracorporeal mechanical

³⁴ *Id.*

³⁵ *Id.*

oxygenation. Such care requires specialized equipment in limited supply as well as an entire team of specialized care providers. MCC has neither specialized equipment nor specialized care providers.


17. MCC is already short-staffed.³⁶ This staffing shortage will only increase as employees need to stay home to care for children whose schools are closed, elderly family members, and other personal health situations. With fewer staff, correctional officers are less able to monitor inmates' health.

Reducing Population Size At Specific Correctional Facilities Is A Crucial Public Health Measure

18. Every effort should be made to reduce chances of exposure to the novel coronavirus; however, given the proximity and high number of inmates, correctional staff, and healthcare workers at pre-trial detention facilities, it will be extremely difficult to sustain such efforts. Therefore, it is an urgent priority to reduce the number of people in detention facilities during this national public health emergency.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: March 18, 2020
Brooklyn, New York



Dr. Jonathan Giftos

³⁶ *Id.*