

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

v.

No. 19-cr-2176 RB

JOSEPH MONTES,

Defendant.

**UNOPPOSED MOTION FOR REVIEW OF DETENTION ORDER
AND RENEWED MOTION FOR IMMEDIATE RELEASE**

Defendant Joseph Montes, through his attorneys, Assistant Federal Public Defenders Imtiaz Hossain and Meghan D. McLoughlin, respectfully requests the Court conduct a *de novo* hearing to review the Magistrate Judge’s Order of Detention Pending Trial (Doc. 11), pursuant to 18 U.S.C. § 3145(b), and grant Mr. Montes immediate release on conditions of supervision. The Government does not oppose the relief requested in this Motion.

I. Introduction

Mr. Montes moves this Court to reconsider its detention order and enter an order granting his immediate release. Mr. Montes, who is a pretrial defendant currently detained at the Otero County Prison Facility (“Otero”), is within the group of people the Centers for Disease Control and Prevention (“CDC”) has categorized as most-at-risk for contracting COVID-19, a dangerous illness spreading rapidly across the world, including throughout New Mexico. The Bail Reform Act provides for the “temporary release” of a person in pretrial custody “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). The health risk to Mr. Montes, because of his diabetes, seizures, and other health problems, given the conditions at Otero, as described in detail

below, necessitates his release on conditions of supervision until this pandemic has ended. If released, Mr. Montes would live with his parents in Grant County, New Mexico.

II. Factual Background

A. Changed Circumstances: COVID-19 Outbreak

As of March 17, 2020, the new strain of coronavirus which causes COVID-19, has infected over 193,100 people, leading to at least 7,866 deaths worldwide.¹ On March 11, 2020, the World Health Organization officially classified COVID-19 as a pandemic.² Governor Michelle Lujan-Grisham declared a State of Emergency on March 11, 2020,³ and has ordered schools to close, limited restaurants and bars to operate at 50% capacity, prohibit bar seating, and space tables six feet apart.⁴ The governor has directed all state agencies to find ways to allow state employees to work from home.⁵ Effective March 19, 2020, all restaurants, bars, and food service establishments in New Mexico are limited to take out and delivery and all malls, gyms, theaters, and salons must close.⁶ The purposes of these measures is to prevent the spread of COVID-19. All of these are measures impossible to achieve within a detention facility.

As of March 18, 2020, there are 28 positive cases of COVID-19 in New Mexico.⁷ On March 18, 2020, all Las Cruces federal court dockets were cancelled after an inmate transported from Otero displayed flu-like symptoms.

The CDC has issued guidance that individuals at higher risk of contracting COVID-19, that is adults over 60 years old and people with chronic medical conditions such as lung disease, heart

¹ *Coronavirus Map: Tracking the Spread of the Outbreak*, The New York Times (March 12, 2020), at <https://nyti.ms/2U4kmud> (updating regularly).

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

³ <https://www.governor.state.nm.us/2020/03/11/updated-governor-department-of-health-announce-first-positive-covid-19-cases-in-new-mexico/>

⁴ <https://www.kob.com/albuquerque-news/covid-19-state-issues-public-health-order-limiting-restaurant-bar-occupancy-to-no-more-than-50/5674949/>

⁵ <https://www.koat.com/article/coronavirus-new-mexico-cases-covid-19/31401320>

⁶ <https://www.koat.com/article/coronavirus-new-mexico-cases-covid-19/31401320>

⁷ <https://www.koat.com/article/coronavirus-new-mexico-cases-covid-19/31401320>

disease, and diabetes, take immediate preventative actions, including avoiding crowded areas and staying home as much as possible.⁸ With confirmed cases in New Mexico that indicate community spread,⁹ we must take every necessary action to protect vulnerable populations and the community at large. Mr. Montes is vulnerable and at higher risk of contracting COVID-19 because he suffers from diabetes, seizures, and other chronic medical conditions.

B. Conditions of Confinement and Spread of Coronavirus

Conditions of pretrial confinement create the ideal environment for the transmission of contagious disease.¹⁰ Inmates cycle in and out of pretrial facilities from all over the world and the country, and people who work in the facilities leave and return daily, without screening. Incarcerated people have poorer health than the general population, and even at the best of times, medical care is limited in pretrial detention centers.¹¹ Many people who are incarcerated also have chronic conditions, like diabetes, hepatitis, or HIV, which makes them vulnerable to severe forms of COVID-19. According to public health experts, 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.”¹²

⁸ *People at Risk for Serious Illness from COVID-19*, CDC (March 12, 2020) at <https://bit.ly/2vgUt1P>.

⁹ The KOAT story supra n. 7 indicates that while the first 5 cases in Bernalillo County had travel-related exposure; the next 8 did not.

¹⁰ Joseph A. Bick (2007). Infection Control in Jails and Prisons. *Clinical Infectious Diseases* 45(8):1047-1055, at <https://doi.org/10.1086/521910>.

¹¹ Laura M. Maruschak et al. (2015). Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-12. NCJ 248491. Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, at <https://www.bjs.gov/content/pub/pdf/mpsfjji1112.pdf>

¹² “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,” (March 2, 2020), at <https://bit.ly/2W9V6oS>.

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.¹³ In China, officials have confirmed the coronavirus spreading at a rapid pace in Chinese prisons, counting 500 cases as of February 2020.¹⁴ 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.”¹⁵ Courts across Iran have granted 54,000 inmates furlough as part of the measures to contain coronavirus across that country.¹⁶

Bernalillo County District Attorney Raúl Tórréz, joined by New Mexico Chief Public Defender Ben Baur, has asked the New Mexico Supreme Court to intervene and delay hearings for out of custody defendants.¹⁷ In his letter to the New Mexico Supreme Court, Chief Public Defender Baur noted, “Social distancing is the single most effective tool we have to slow the spread and flatten the curve to ensure that adequate healthcare resources are available as the numbers of infections increase. Unfortunately, incarcerated people do not have the ability to utilize social distancing techniques or to protect themselves in any meaningful manner.”¹⁸ Chief Public Defender Baur called for a suspension of arrest and detention for non-violent offenses, failure to pay fines,

¹³ *Prisons and Jails are Vulnerable to COVID-19 Outbreaks*, The Verge (Mar. 7, 2020) at <https://bit.ly/2TNeNZY>.

¹⁴ 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>.

¹⁵ 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>.

¹⁶ 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>.

¹⁷ Katy Barnitz, *DA to Supreme Court: ‘More drastic measures are needed’; Chief Public Defender says virus could spread rapidly in jails* Albuquerque Journal, March 17, 2020, p. A5, available at: https://abqjournal-nm.newsmemory.com/?token=6de4ac0363592ffd8224cfe06797f461_5e70fd08_2eb4cef&selDate=20200317&utm_source=emailMarketing&utm_medium=email&utm_campaign=TecnaviaMorningPush

¹⁸ <https://www.nmcourts.gov/news.aspx>

technical violations of release or probation, and other violations which do not threaten public safety. On March 17, 2020, in response to these pleas and the pandemic, the New Mexico Supreme Court suspended all criminal jury trials, in addition to its previous suspension of civil trials.

C. Specific Conditions at Otero

Otero is one of New Mexico’s largest pretrial detention facilities; it has a capacity of 1,421 inmates.¹⁹ It is operated by the for-profit Management and Training Corporation.²⁰ Most of the facility houses federal detainees of the United States Marshals Service and U.S. Immigration and Customs Enforcement.²¹ During 2017 surprise inspection by the Department of Homeland Security’s Office of Inspector General, auditors found evidence of systematic and suspicionless strip searches, rotten food and moldy bathrooms, the misuse of segregation, the denial of communications and long delays for medical care.²² A 2011 ACLU report was highly critical of the medical care provided to inmates at Otero found inmates requesting medical care waited two or three days on average.²³

III. The Bail Reform Act Requires Mr. Montes’s Release

A “judicial officer may, by subsequent order, permit 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). The circumstances that existed when Mr. Montes was ordered detained have now changed. There is a pandemic that poses a direct risk to Mr. Montes

¹⁹ Otero County Prison Fact Sheet, <https://www.mtctrains.com/facility/otero-county-prison-facility/>

²⁰ <https://www.mtctrains.com/facility/otero-county-prison-facility/>

²¹ https://en.wikipedia.org/wiki/Cibola_County_Correctional_Center

²² Sarah Macaraeg, *Problems at Otero County ICE Detention Center Found in Audit*, Las Cruces Sun News (Dec. 23, 2017) <https://www.lcsun-news.com/story/news/local/new-mexico/2017/12/23/problems-otero-county-ice-prison-found-audit/978394001/>

²³ Emily P. Carey, *Outsourcing Responsibility, The Human Cost of Privatized Immigration Detention in Otero County* (January 2011) <https://www.aclu-nm.org/en/news/aclu-releases-report-immigrant-detention-otero-county>

that is far greater if he continues to be detained during this public health crisis. Mr. Montes is vulnerable because he suffers from diabetes, seizures, and other medical conditions.

As an initial matter, the Bail Reform Act requires that a court should “bear in mind that it is only a ‘limited group of offenders’ who should be denied bail pending trial.” *United States v. Shakur*, 817 F.2d 189, 195 (2d Cir. 1987) (quoting S. Rep. No. 98-225 at 7, as reprinted in 1984 U.S.C.C.A.N. 3182, 3189); *see United States v. Salerno*, 481 U.S. 739, 755 (1987) (suggesting that “detention prior to trial or without trial is the carefully limited exception “to liberty before trial). One charged with a crime is, after all, presumed innocent. *Stack v. Boyle*, 342 U.S. 1, 4 (1951). A single individual unnecessarily detained before trial is one individual too many, and the increasing use of the practice places tremendous wear on our constitutional system. *United States v. Montalvo-Murillo*, 495 U.S. 711, 723–24 (1990) (Stevens, J., dissenting, joined by Brennan and Marshall, JJ.). Due to the crucial interests involved, it follows that a “case-by-case” approach is required at any stage of the case in assessing the propriety of pretrial detention. *See United States v. Gonzales Claudio*, 806 F.2d 334, 340 (2d Cir. 1986) (discussing due process analysis for evaluating propriety of prolonged pretrial detention and the interests at stake) (citations omitted).

The courts have long recognized that there is no greater necessity than keeping a defendant alive, no matter the charge. As Judge Weinstein held, “We do not punish those who have not been proven guilty. When we do punish, we do not act cruelly. Continued incarceration of this terminally ill defendant threatens both of these fundamental characteristics of our democracy.” *United States v. Scarpa*, 815 F. Supp. 88, 93 (E.D.N.Y. 1993) (pretrial defendant with AIDS facing murder charges released on bail because of the “unacceptably high risk of infection and death on a daily basis inside the MCC”). *See also United States v. Adams*, No. 6:19-mj-00087-MK, 2019 WL 3037042 (D. Or. July 10, 2019) (defendant charged with violation of the Mann Act and possession of child pornography and suffering from diabetes, heart conditions, and open sores released on home detention because of his medical conditions); *United States v. Johnston*, No. 17-00046 (RMM),

2017 WL 4277140 (D. D.C. Sept. 27, 2017) (defendant charged with violation of the Mann Act and in need of colon surgery released to custody of his wife for 21 days); *United States v. Cordero Caraballo*, 185 F. Supp. 2d 143 (D. P.R. 2002) (badly wounded defendant released to custody of his relatives).

This Court should consider the “total harm and benefits to prisoner and society” that continued pretrial detention of Mr. Montes will yield, relative to the heightened health risks posed to Mr. Montes during this rapidly encroaching pandemic. *See United States v. D.W.*, 198 F. Supp. 3d 18, 23 (E.D.N.Y. 2016); *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring) (calling for heightened judicial scrutiny of the projected impact of jail and prison conditions on a defendant); *United States v. Mateo*, 299 F. Supp. 2d 201, 212 (S.D.N.Y. 2004) (reducing sentence where defendant’s pretrial conditions were “qualitatively more severe in kind and degree than the prospect of such experiences reasonably foreseeable in the ordinary case”); *United States v. Francis*, 129 F. Supp. 2d 612, 619–20 (S.D.N.Y. 2001) (reducing sentence in acknowledgment of “the qualitatively different, substandard conditions to which the Defendant was subjected “ in pretrial detention).

IV. Conditions of Release are Available

From Mr. Montes’s perspective, his life, not only his liberty, is on the line, creating a powerful incentive to abide by any release conditions the Court may impose and changing the calculus that initially led to the denial of bail in this case. Additionally, on February 25, 2020, this Court suppressed all the physical evidence against Mr. Montes. The government is mulling whether to appeal the Court’s ruling. If the government decides to appeal, this case will be stayed for approximately one year until the court of appeals issues its decision. Mr. Montes respectfully requests that the Court release him on reasonable conditions during the appeal.

Critically, during his pretrial release, Mr. Montes will not be left to his own devices, but will be supported and monitored by Pretrial Services. Since 2009, Pretrial Services’ data has found that

only 2.9% of defendants in the highest risk category were re-arrested for a violent crime while on release.²⁴ In the District of New Mexico, the Pretrial Services Violations Summary Report for the 12-Month Period Ending September 30, 2018, of the 919 cases in release status, there were violations in only 14.6% of the cases, and only 33 failures to appear. There were zero re-arrest violations (for new crimes).²⁵ The chronically ill, no matter what crime they are accused of, pose a lower risk of violating supervision, particularly during a global pandemic during which even leaving the house will endanger their lives. If released, Mr. Montes would live with his parents in Grant County, New Mexico, who have been found to be suitable third-party custodians.

V. Conclusion

Mr. Montes is among the vulnerable population at heightened risk of getting very sick from COVID-19. For all of the above reasons, Mr. Montes should be granted immediate release on conditions of supervision.

Assistant United States Attorney Bradley Bartlett does not oppose the relief requested in this Motion.

Respectfully submitted,

Electronically filed March 19, 2020

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²⁴ Thomas H. Cohen, Christopher T. Lowenkamp, and William E. Hicks, *Revalidating the Federal Pretrial Risk Assessment Instrument (PTRA): A Research Summary* (September 2018) at https://www.uscourts.gov/sites/default/files/82_2_3_0.pdf.

²⁵ Table H-15, U.S. District Courts -- Pretrial Services Violations Summary Report For the 12-Month Period Ending September 30, 2018, available at: <http://jnet.ao.dcn/court-services/probation-pretrial-services/caseload-tables/pretrial-services-h-tables-september-2018/pretrial-services-violations-summary-report>

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