**NO. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**In The**

**Court of Criminal Appeals of Texas**

*EX PARTE*

**XXXXXXXXXXXX**

[ON APPEAL IN CAUSE \_\_\_\_\_\_\_\_\_\_\_

IN THE COURT OF APPEALS

FOR \_\_\_\_\_\_\_\_\_\_\_\_\_\_

AND FROM TRIAL CAUSE \_\_\_\_\_\_\_\_\_\_

IN THE \_\_\_\_\_\_H DISTRICT COURT,

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ COUNTY, TEXAS]

**WRIT OF HABEAS CORPUS SEEKING TEMPORARY RELEASE**

**OF MEDICALLY VULNERABLE INMATE SERVING A LIFE SENTENCE TO HOME CONFINMENT DURING THE**

**PANDEMIC AND MOTION TO SEAL THIS WRIT**

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\* Lead Counsel

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**TO THE HONORABLE TEXAS COURT OF CRIMINAL APPEALS:**

Now comes, xxxxxxxxx, who by her undersigned counsel, seeks that this writ of habeas corpus be sealed because it contains private health information of xxxxxxx. *See* Rules 9.10, 31.1, 71.1 of the Texas Rules of Appellate procedure. This writ addresses the requested temporary release of xx xxxxxx on compassionate release to home confinement during the coronavirus pandemic based upon her vulnerability to the coronavirus and serious medical complications because she suffers from \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_. Thus, it contains sensitive protected health information about xxxxxxx.

This is also a writ of habeas corpus pursuant to Article 1, Section 12 of the Texas Constitution, Arts. 1.09, 11.01, 11.25 Texas Code of Criminal Procedure, Section 22.035 of the Texas Government Code, and emergency order of the Supreme Court of Texas (Misc. Docket No. 20-9042) and the Court of Criminal Appeals (Misc. Docket No. 20-007), seeking her temporary release to home detention. In addition, she requests that this Court suspend the applications of Article 42.09, Section 3, Texas Code of Criminal Procedure (requiring confinement of persons convicted of capital murder and sentenced to life) and Article 44.04(b) (disallowing bail when a person has been convicted of a felony and sentenced to more than 10 years confinement).

Counsel has conferred with the State, which \_\_\_\_\_\_\_\_\_\_.

Introduction

The novel corona virus (COVID-19) is a rapidly spreading pandemic that has no cure, no know treatment, and no vaccine. Persons throughout the nation with specialized knowledge in the CDC, the U.S. Attorney General, and Sheriffs have described that persons in jails and prisons are vulnerable to COVID-19 and that CDC requirements and government ordered restrictions cannot be fully implemented in the jail and prison facilities. On March 26, 2020, US Attorney General John Barr has asked for the Bureau of Prisons to release vulnerable persons from the Bureau of Prisons in light of COVID-19. US Attorney General William Barr March 26, 2020 Memorandum for Director of Bureau Prisons, Subject: Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic. *See* Attorney General Barr’s Memo attached as Exhibit 1. Coryell County, where the Crain Unit in which Ms. Patterson is housed, has a COVID-19 case in the community. <https://www.kwtx.com/content/news/Second-Coryell-County-resident-tests-positive-for-COVID-19-569293531.html>

The surrounding counties also have cases. Id. Patterson requests that this Court order her release from confinement by the Texas Department of Criminal Justice Institution Division on temporary emergency release to home confinement during the state of disaster declared by the Governor of Texas and national emergency declared by the President of the United States because of the coronavirus. She seeks release from this Court in the first instance since the trial court has no authority to release her under this Court’s precedent. *See Ex parte Baltimore,* 616 S.W.2d 205, 207 (Tex. Crim. App. 1981); *Ex parte Williams,* No. 14-18-00568-CR 2020 WL 477314 at 3(Tex. App.—Houston [14th Dist.] January 30, 2020, no pet.).

xxxxxx was convicted on \_\_\_\_\_\_\_\_\_ of \_\_\_\_\_\_\_\_\_\_\_\_. She was sentenced to \_\_\_\_\_\_\_\_\_. *See* Judgements and Commitment order attached as cumulative Exhibit 2, \_\_\_\_\_\_\_\_\_. While in the ordinary course of criminal appeals, xxxxxxx would be ineligible for release on bail pending her appeal under Articles 42.09, Section 3 and 44.04(b) of the Texas Code of Criminal Procedure, neither xxxxxxxx case nor her personal circumstances could be considered “ordinary.” Her conviction and appeal raise unique and extraordinary issues, warranting her release to home confinement during the pandemic, particularly when considered in light of the unique medical and health issues confronting xxxxxxx during the current COVID-19 crisis.

She was convicted under the law of parties and is not accused of having herself engaged in any violent act. *See* Opinion, \_\_\_\_\_\_\_\_\_\_ as Exhibit 3.

Her case is currently on appeal in the \_\_\_ Court of Appeals, \_\_\_\_\_\_\_\_\_\_; where an opinion has issued and an extension to file a motion for rehearing has been granted to \_\_\_\_\_\_\_\_. *See* Order granting extension to file motion for rehearing attached as Exhibit 4. Under Article 11.25 of the Code of Criminal Procedure and Section 22.35 of the Texas Government Code, she may be temporarily released to custody in home confinement by this Court under the circumstances presented here.

This Court may suspend the rules pursuant to Section 22.35 of the Texas Government Code and order her temporary release to home confinement pursuant to Article 11.25 of the Texas Code of Criminal Procedure for her health and safety in light of the current state of disaster in all 254 Texas Counties and the national emergency extant by virtue of the virulent spread of the coronavirus. As set out below, the circumstances presented by someone with xxxxxxx unique health issues during these extraordinary times are dire. Section 22.35 of the Texas Government Code expressly empowers this Court to suspend “procedures for the conduct of any court proceeding affected by disaster during the pendency of any disaster declared by the governor.” xxxxxx suffers from a severe medical condition, diagnosed as\_\_\_\_\_\_\_\_. *See* Physician diagnosis and recommendations and medical records Attached as cumulative Exhibit 6. xxxxxx meets the definition of a person afflicted with a disease, contemplated by Article 11.25, allowing for her release to a safe place for her health and safety.

The coronavirus is a particular threat to prison populations generally because of the circumstances of confinement and the inmates’ close proximity to each other. See generally, <https://www.prisonpolicy.org/virus/virusresponse.html>

<https://www.businessinsider.com/trump-consider-coronavirus-executive-order-federal-prisons2020-3> .

The Bureau of Prisons stated that “the densely packed nature of prisons ‘creates a risk of infection and transmission for inmates and staff.’” <https://www.nytimes.com/2020/03/17/us/coronavirus-prisons-jails.html>

In the District of Oregon, federal Judge Hernandez varied downward from a sentence of imprisonment in two cases to a sentence of home confinement, because of the pandemic. The International Association of Chiefs of Police told ABC news that police are scaling back arrests for low-level offenses to limit officer exposure. <https://abcnews.go.com/US/coronavirus-outbreak-changing-us-criminal-justice-system/story?id=69757440>

Sheriff David Mahoney, with the National Sheriffs’ Association, is working with local, state, and federal partners “to decrease the number of people who are physically arrested and brought to jail.” <https://abcnews.go.com/US/coronavirus-outbreak-changing-us-criminal-justice-system/story?id=69757440>

For persons in custody in prisons, President Trump is considering issuing an Executive Order to release elderly inmates in federal prisons. <https://www.businessinsider.com/trump-consider-coronavirus-executive-order-federal-prisons2020-3> One of the reasons for this is because the elderly is a high-risk group for contracting coronavirus and also is a high-risk group for serious complications from the virus. Id.

More relevant to the circumstances presented by xxxxxx, persons with serious underlying health conditions, regardless of their age, are in a high-risk group for serious complications from the coronavirus. *See* The Lancet: Covid-19 consider cytokine storm sydromes and immunosuppression, March 16, 2020 attached as Exhibit 5. Xxxxxx is \_\_-years-old and has been diagnosed with \_\_\_\_\_\_\_\_, exacerbated by \_\_\_\_\_. *See* Physician declarations and medical records Attached as Exhibit 6. Someone with \_\_\_\_\_\_\_\_\_, is particularly vulnerable to serious complications from coronavirus and is not responsive to supportive medical treatment which may have been effective for others without such compromised immune systems who contract the coronavirus. Exhibit 5. Persons with hypertension are also vulnerable. Exhibit 5. In persons with lupus and hypertension, the coronavirus can be the equivalent of a death sentence. *See* Order of Judge Biery releasing a person with another immunocompromised disorder (multiple sclerosis) attached as Exhibit 7.

“While Mr. Alfaro deserves to go to prison for his crimes, he does not deserve the death penalty in the local jail.” Id.

Correctional systems around the country have been granting compassionate releases under the circumstances presented by xxxxxx medical condition and compromised immune system. For example, after an investigator at a jail facility died from the coronavirus and an officer and inmate contracted the disease, the New York City Board of Correction worked to release all persons at high risk of infection. Closer to home, Sheriff Ed Gonzalez, who oversees the third largest jail system in the country, in Harris County, Texas, is seeking the compassionate release of hundreds of vulnerable detainees.

“’Jails and prisons are fertile ground for the spread of infectious disease,’ Gonzales said, noting that his staff has worked hard to curb an outbreak by addressing hygiene and health concerns. ‘My nightmare scenario is that an outbreak happens at the county jail.’

But he said standards implemented in the general community are impossible to follow or hard to do in a jail. ‘Our criminal justice system must become more aggressive in granting compassionate releases,’ he said.” <https://www.houstonchronicle.com/news/houston-texas/houston/article/harris-county-sheriff-gonzalez-jail-inmate-release-15143578.php>

The Texas Code of Criminal Procedure makes specific allowance for release if a person in legal custody is afflicted with a disease which will render a removal necessary for the preservation of life. Article 11.25 provides for the removal of the prisoner to some other place where his health will not likely suffer. And when it appears that any species of confinement will endanger an inmate’s life, he may be released to a place where he is safe. See Art. 11.25, Texas Code of Criminal Procedure, Person Afflicted with Disease.

While Art. 11.25 has been held by this Court not to apply to persons incarcerated after conviction for a felony, *See Ex Parte Smith,* 64 S.W. 1052 (Tex. Crim. App. 1901)[interpreting Article 175, the predecessor statute to Art. 11.25], this Honorable Court has the power to suspend same under circumstances, such as these, which endanger the very life of someone such as xxxxxx, during the pendency of her appeal in order to provide for her custody in a place medically safe, given that her lupus and hypertension render her particularly vulnerable to the coronavirus pandemic in such confined quarters. For example, in dicta, this Court in *Ex parte Baltimore,* 616 S.W.2d 205, 207 (Tex. Crim. App. 1981), discussed release of persons where same would be necessary for the preservation of life or where confinement would endanger the person’s life.

While ordinarily, a person with lupus and hypertension can be housed and treated in the Texas Department of Criminal Justice, Institution Division, where, as here, such person has a severely compromised immune system and faces a substantially increased risk of suffering serious and fatal medical consequences, such an individual should be released temporarily to home confinement during the current pandemic in order to protect their life and safety. Exhibit 6 “ “

As Houston Sheriff Gonzalez noted, above, it is difficult, if not impossible, to apply the same standards and protocols applicable in the community at large to the restrictive requirements of a custodial setting. For example, social distancing is not practical, isolation is impossible (there is not enough room and solitary confinement has been determined to be the equivalent of torture[[1]](#footnote-1)), and hand sanitizer is contraband in the prison setting. Cleaning supplies are not readily available to all inmates in the prison facility. Nor can the facility be kept adequately disinfected as a practical matter because of the daily mass movement of inmates to maintain the prison and take care of daily necessary duties. *See* Declaration from xxxxxxx Exhibit 8.

“…” Exhibit 8.

Photos of the Lane Murray women’s prison unit shows the housing, recreation, and sink area of a women’s prison. The photos demonstrate the type of close housing xxxxxx describes in her declaration that also exist at the \_\_\_\_\_ Unit where she is confined. *See* attached photos as Exhibit 9.

If released, xxxxx will reside with her mother on home confinement where she successfully remained on house arrest for two years during the pendency of her trial and during the trial. *See* Exhibit 10, conditions of bond, \_\_\_\_\_\_\_\_\_\_. Her mother is \_\_\_\_\_\_\_\_\_\_ and her address is \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_. xxxxxxx family will pay for her safe and secure transport to the place of her home detention from the prison facility where she currently resides: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

Numerous federal courts are releasing COVID-19 vulnerable persons from custody recognizing the risks to those who have underlying immunocompromised conditions. See *United States v. Perez*, 17 CR 513-3, slip op. page 3 (S.D.N.Y. April 1, 2020); United States v. Campagna, No. 16 Cr 78-01, 2020 WL 1489829 , at 3 (S.D.N.Y. Mar. 27, 2020); *United States v. Rodriguez*, 2:03CR00271-AB-1, page 1 (E.D. Pa. April 1, 2020); *United States v. Brannan*, No. 4:15CR80-1 (S.D. Tex. April 2, 2020)[attached as Exhibit 11].

**CONCLUSION AND PRAYER**

Based on the rapid spread of COVID-19 and the vulnerable immune-compromised condition of xxxxxxx, she hereby prays that she be released to temporary home confinement during the Covid-19 pandemic and to any further relief to which she may be entitled at law, in equity, and under this Court’s supervisory power.

Respectfully submitted:

By: /s/ Cynthia E. Orr

Cynthia E. Orr

CYNTHIA E. ORR\*

Bar No. 15313350

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# VERIFICATION

# My name is \_\_\_\_\_\_\_\_\_, my date of birth is \_\_\_\_\_\_\_\_, and my bar number is \_\_\_\_\_\_\_\_\_. My address \_\_\_\_\_\_\_\_\_\_\_\_\_\_. I declare under penalty of perjury that the foregoing is true and correct upon information and belief.

Executed on the 3rd day of April, 2020.

Declarant

\_\_\_\_\_\_\_\_\_\_\_\_

# CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above document was served on the following counsel by *via* the state e-filing service and *via* email on this 3rd day of April 2020:

District Attorney

By: */s/Cynthia E. Orr*

Cynthia E. Orr

# CERTIFICATE OF COMPLIANCE

I certify that this Writ of Habeas Corpus has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document contains \_\_\_\_\_ words according to Microsoft Office Word 365.

By: */s/Cynthia E. Orr*

Cynthia E. Orr

1. Solitary confinement is a punishment for violent behavior while in custody. It is to be used for a very short time, a day to a few days, commensurate with the violent infraction under consideration. Its use here would constitute cruel and unusual punishment and would be psychologically damaging to Ms. Patterson. Some medical authorities have equated it with torture because of its negative psychological effect. Arrigo, Bruce A.; Bullock, Jennifer Leslie (December 2008). ["The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units"](https://semanticscholar.org/paper/8f8fbb6bd68357311bb82e48a8569114bba3d8ba). International Journal of Offender Therapy & Comparative Criminology. 52 (6): 622–640; [;](https://pubmed.ncbi.nlm.nih.gov/20305083/) Metzner JL, Fellner J.J Am Acad Psychiatry Law. 2010;38(1):104-8; Kysel, Ian (October 2012). [Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons in the United States](https://www.hrw.org/sites/default/files/reports/us1012ForUpload.pdf) (PDF).  [↑](#footnote-ref-1)