

CLIENT, by appellate attorney **ATTORNEY**, files this Urgent Renewed Application for Bail Pending Appeal. In light of the COVID-19 pandemic and its effect on court proceedings, no hearing is requested. Given the scientific consensus that incarcerated populations are at high risk for contracting and having serious complications from COVID-19, immediate relief is requested.

This motion is based on the attached memorandum, exhibits, all files and records in this case, and such further information or argument as the Court requests.

Respectfully submitted,

DATED: March 19, 2020

/s/ Davina T. Chen

Davina T. Chen

Memorandum of Points and Authorities

I. Introduction

This Court should release **CLIENT** on bail pending appeal. She has been in custody since January 13, 2016, but her appeal is still not resolved. With credit for good conduct, her projected release date is July 24, 2021. With the maximum allowance for residential reentry of 12 months, she could be in a residential reentry center by July 2020. But with the more typical 6 months approved by the Bureau of Prisons, she would not be released in January 2021. This application seeks her release on bail or home confinement immediately in view of the approach of the end of her term and the increased risk for contracting, and experiencing serious complications from, COVID-19 among incarcerated persons. Reducing the number of incarcerated persons is currently a public health imperative.

In resolving her prior motions, this Court found by clear and convincing evidence that Ms. **CLIENT** was neither a flight risk nor a danger to the community, and her appeal was not filed for purposes of delay. (CR 1819 at 3-4). But this Court found her appeal raised no substantial question that would trigger any of the bases for granting bail and it did not find any exceptional reasons to grant bail. (CR 1819 at 4-7; CR 1904).

On appeal, the Ninth Circuit found only that she had not shown exceptional reasons why detention pending appeal is not appropriate. (CA 43).

The time to release Ms. **CLIENT** is now. In addition to issues that go to her conviction, Ms. **CLIENT**'s appeal raises issues that would require her to be resentenced. If she is not released now, she will receive no actual relief in such a resentencing. On the question of whether the time for appeal would likely exceed Ms. **CLIENT**'s sentence, this Court noted only that the median time for disposition of appeals in the Ninth Circuit is approximately 15 months and, thus, the appeal would likely be resolved long before the completion of her sentence. But Ms. **CLIENT**'s appeal has now been pending for nearly four years. If she were to prevail even on only the sentencing aspects of her appeal, this Court would have no ability to reduce her actual prison time without a prompt release.

Most importantly, given that this Court has already found she poses no risk of flight or danger to the community, the current COVID-19 crisis presents exceptional reasons why she should be released now. Doctors and medical workers across the US have raised the alarm about the coronavirus's risk to prison populations. Epidemiologists have likewise opined that reducing incarceration numbers is a public health imperative. Even the Los Angeles Times has called for federal prisoners to be released.

II. Legal Requirements for Bail Pending Appeal

A. Bail Pending Appeal

Bail on appeal is governed by the Bail Reform Act of 1984. Pursuant to 18 U.S.C. § 3143(b)(1), a defendant is entitled to release pending appeal if the court finds the following:

(1) that the defendant is not likely to flee or pose a danger to the safety of any other person in the community if released;

(2) that the appeal is not for purpose of delay;

(3) that the appeal raises a substantial question of law or fact; and

(4) that if that substantial question is determined favorably to defendant on appeal, that decision is likely to result in reversal or an order for a new trial of all counts on which imprisonment has been imposed [or a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process].

United States v. Handy, 761 F.2d 1279, 1283 (9th Cir. 1985); § 3143(b)(1)(A)(iv).

To satisfy the third and fourth prongs, Ms. Rodriguez need not show her appellate issues are likely to result in a reversal, new trial, or shorter sentence. Rather, “‘substantial’ defines the level of merit required in the question presented and ‘likely to result in reversal or an order for a new trial’ defines the type of question that must be presented.” *Handy*, 761 F.2d at 1280. “An issue is substantial if it is ‘fairly debatable’ or ‘fairly doubtful,’ that is, ‘of more substance than would be necessary to a finding that it was not frivolous.’” *Garcia*, 340 F.3d at 1021 n.5 (quoting *Handy*, 761 F.2d at 1283).

“The second part of the requirement—that the question be likely to result in reversal, a new trial, a non-prison sentence, or a sentence reduced to less than the time that would be served by the end of the appeal process—concerns only the type of question that meets the requirement; it does not involve assessing the likelihood that a reversal will occur in the particular case.” *Garcia*, 340 F.3d at 1021 n.5 (quoting *Handy*, 761 F.2d at 1280).

B. Bail Where Offense Has Maximum Sentence of Life Imprisonment

For defendants convicted of an offense for which the maximum sentence is life imprisonment, there is an additional requirement that it be “clearly shown that there are exceptional reasons why detention would not be appropriate.” 18 U.S.C. §§ 3143(b)(2), 3142(f)(1)(B), 3145(c). *Garcia*, 340 F.3d at 1015. A wide range of factors may be considered in determining whether there are exceptional reasons why incarceration before a conviction and sentence are final is inappropriate. *Id.* at 1018-19. These include, for example, whether the defendant led an exemplary life prior to her offense and would likely to continue to contribute to society significantly if allowed to remain free on bail; the length of the prison term; any factors that would render prison unusually harsh for a particular defendant; the nature of the defendant’s arguments on appeal; and any factors that would render the defendant’s flight or danger to the community exceptionally unlikely. *Id.* at 1019-21. In addition, cases in which incarceration would impose exception risks to a defendant physical well-being may constitute exceptional circumstances warranting bail pending appeal even in these cases. *Id.* at 1019-20; see also *United States v. Wetselaar*, 2017 WL 6514650 (9th Cir. 2017) (finding, over government objection, exceptional reasons for bail pending appeal based to defendant’s illness).

III. This Court should order CLIENT released.

A. Ms. **CLIENT** meets all four requirements for bail pending appeal under § 3143(b)(1)(a).

This Court has already found by clear and convincing evidence that Ms. **CLIENT** is not likely to flee, that she is not a danger to others or the community. (CR 1819 at 4). It has also already found that her appeal was not filed for purposes of delay. (*Id.*).

In determining that her sentencing issues on appeal—that the court erred in increasing her sentence after trial and by denying a mitigating role adjustment—did not meet the criteria for release on bail, this Court has noted only that the time for appeal would not exceed the likely duration of Ms. **CLIENT**'s sentence. (CR 1904 at 1 (citing CR 1819 at 4)). This Court used as its baseline an estimated 15-month period for disposition of appeals. (*Id.*). Acknowledging the complexity of this case, the Court predicted it would still be resolved long before the completion of her sentence. (*Id.*).

Through no fault of Ms. **CLIENT**'s, her appeal has extended for a considerably longer period and was not argued until February 5, 2020. It was on a limited remand to obtain sealed documents from June 7, 2017, until May 21, 2018. Then, on June 25, 2018, the court dismissed the consolidated appeal of codefendant Peter Ojeda. The death of Mr. Ojeda required undersigned counsel to return to the voluminous record to gain greater familiarity with those portions related to the issues delegated to Ojeda's counsel. Nevertheless, I filed my Opening Brief on October 30, 2018, in advance of its November 2, 2018 due date. The government then requested multiple extensions before filing its Answer on June 3, 2019. It was stricken as excessively long, and refiled on July 12, 2019, but then stricken again because the 26 volumes of records it filed were not in compliance. The conforming Answer and Excerpts were filed on August 27, and Ms. Rodriguez's Reply was filed less than one month later on September 24, 2019.

Ms. **CLIENT** was sentenced to 78 months based on an offense level 28/criminal history category I. With even two levels for minor role, her sentencing range would be 63-78 months. With the four levels the Court awarded to Ms. **CO-D**, the range would be 51-63 months. Further, her exceptional performance in custody warrants a reduced sentence on remand. *Pepper v. United States*, 131 S.Ct. 1229 (2011). Ms. **CLIENT** completed her GED in custody. (Exhibit B). And she enrolled in and completed certificate programs in community college (*Id.*) Moreover, she completed the entire residential portion of the Residential Drug Abuse Treatment Program despite the fact that BOP considers her offenses of conviction to render her ineligible for the one-year early-release incentive. (*Id.*).

In short, her appeal now presents a non-frivolous substantial question that, if resolved in her favor, would likely result in a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process. § 3143(b)(1)(A)(iv).

B. There are exceptional reasons why continued incarceration pending appeal is not appropriate

These are exceptional times. In these times, continued incarceration of Ms. **CLIENT** Rodriguez, who poses no risk of flight or to public safety, is inappropriate. Ms. **CLIENT** is currently at the Federal Correctional Institution in Victorville, California. She is 56 years old, which the CDC now considers elderly, and has long suffered from a pre-diabetic condition. She is thus at increased risk for contracting, and suffering serious complications from, COVID-19. This, combined with her exemplary performance on pretrial release and in prison, the short remaining term of her sentence, and the high likelihood that her

appeal will result in a sentence reduced to a term lower than her period of incarceration plus the expected duration of her appeal present exceptional reasons why her continued incarceration is not appropriate. *Garcia*, 340 F.3d at 1019-21.

As the Court is no doubt aware, global health officials and the CDC agree that COVID-19 is a pandemic. (Decl. of Counsel, ¶6.) Symptoms of COVID-19 include “fever, tiredness, and dry cough,” while some of those infected “may have aches and pains, nasal congestion, runny nose, sore throat or diarrhea.” (*Id.* at ¶7.) According to the WHO, “[a]round 1 out of every 6 people who gets COVID-19 becomes seriously ill and develops difficulty breathing.” (*Id.*) Six percent of infected people are estimated to become critically ill, where “the immune system is . . . spiraling [sic] out of control and causing damage throughout the body.” (*Id.* at ¶8.) More succinctly, “it becomes multi-organ failure.” (*Id.*)

Someone with only very mild symptoms like coughing can still spread COVID-19 to other people. (*Id.* at ¶7.) Even asymptomatic people have transmitted the virus to others. (*Id.* at ¶9.) COVID-19 is spread not only by physical contact, but “[p]eople can also catch COVID-19 if they breathe in droplets from a person with COVID-19 who coughs out or exhales droplets. This is why it is important to stay more than 1 meter (3 feet) away from a person who is sick.” (*Id.* at ¶7.)

COVID-19 has emerged in the Central District of California. The number of new cases reported in Los Angeles County, for example, increases each day, with numerous now “likely due to community transmission.” (Decl. of Counsel, ¶10.) On March 15, 2020, there were 69 cases, and only 24 hours later, there were 94. (*Id.* at ¶10, 11.) On March 17, 2020, that number increased by more than 50 percent, with 144 cases. (*Id.* at ¶11.)

Because of how quickly and easily COVID-19 can spread, experts have advised people on how to minimize their risk of exposure. Such safety protocol includes vigilant hand-to-mouth hygiene like frequent handwashing. Most important, though, is engaging in “social distancing,” i.e., opting out of congregate settings, abstaining from mass gatherings, and staying at least six feet away from others to avoid community spread. (*Id.* at ¶12.) On March 15, 2020, California Governor Gavin Newsom called for all California residents aged 65 and older, and those with chronic disease, to stay in their homes. (*Id.* at ¶13.) On March 16, 2020, the President of the United States urged people to avoid gatherings of 10 or more people. (*Id.* at ¶14.)

Compounding the dangerous spread of COVID-19 is the scarcity of available and reliable testing and treatment equipment. (*Id.* at ¶15.) As one expert notes: “When every hospital is competing for the same thing, that’s what happens—you end up being in very short supply.” (*Id.* at ¶15 (second citation).)

Prisons are the ideal environment for the transmission of contagious disease. (*See id.* at ¶16.) Prisons and jails “have become breeding grounds for infectious epidemics, with severe consequences for both prisoners and the public alike.” (*Id.* at ¶17.) Public health experts agree that people in custody “are at special risk of infection, given their living situations.” (*Id.* at ¶18.)

People in custody are in near constant physical contact with other inmates and prison staff. Consider, for example, how quickly COVID-19 spread in the closed confines of cruise ships. But in prisons, people have far more limited access to hygiene than cruise ships. Showers are rarely private, multiple people share tiny and cramped living spaces, including exposed toilets and wash areas. Soap is

scarce, and hand sanitizer is nonexistent. Access to clean laundry and linens is limited. And inmates serve other inmates food.

Dr. Jaime Meyer, an Assistant Professor of Medicine at Yale School of Medicine, is a board certified physician of Internal Medicine, Infectious Diseases and Addiction Medicine who has worked for over a decade on infectious diseases in jails and prisons. In another matter, she submitted a sworn declaration describing exactly how susceptible inmates are to contagious diseases, which we have attached as Exhibit A. (Decl. of Counsel at ¶28, Exhibit A.) “Congregate settings such as jails and prisons allow for rapid spread of infectious diseases that are transmitted person to person, especially those passed by droplets through coughing and sneezing.” (*Id.* at Exhibit A, ¶9.) Therefore, “[w]hen people must share dining halls, bathrooms, showers, and other common areas, the opportunities for transmission are greater.” (*Id.*) Even worse, “[s]paces within jails and prisons are often also poorly ventilated, which promotes highly efficient spread of diseases through droplets.” (*Id.*)

As Dr. Meyer also notes, it is not just exposure to fellow inmates that increases the risk of COVID-19 spread. (*Id.* at ¶8.) Each transport, cuffing, and strip search exposes an inmate to a risk of infection brought from prison staff, and vice versa. There is already evidence of exposure among local law enforcement. (Decl. of Counsel, ¶19.) (LAPD and LAX officers tested positive for COVID-19.) The Santa Clara County Jail has already quarantined inmates after a defense attorney who visited the jail tested positive for COVID-19. (*Id.* at ¶20.)

The Bureau of Prisons itself confirms that the nature of prisons “creates a risk of infection and transmission for inmates and staff.” (*Id.* at ¶31.) One Texas federal prison worker told the New York Times, “We don’t have the ventilators on hand at all. We are not a hospital. We don’t have the medical staff.” (*Id.*) At a federal prison in Florida, prison employees told CBS News that their facility had 60 masks to be shared among 200 employees, no soap in multiple staff restrooms, a lack of hand sanitizer and a supply of gloves that may only last through next week. Workers said they planned to reuse the disposable masks. (*Id.* at ¶ 32). No evidence suggests that any other federal prison, including those in the Central District of California, would be more equipped to handle the risk of infection.

Here, given the exponential spread of the virus, it is likely that COVID-19 has already entered federal prisons. Meanwhile, these facilities are not equipped to deal with a pandemic on this scale. Neither the CDC nor the California Department of Public Health (“CDPH”) provide specific guidance for prison administrators for addressing inmate exposure to COVID-19.

Finally, incarcerated people tend to have poorer health than the general population, and even at the best of times, medical care is limited. (*See id.* at ¶21.) Many people who are incarcerated also have chronic conditions, like diabetes or HIV, which makes them vulnerable to severe forms of COVID-19. The situational risks described above only enhances the risks of infection and complications to such people.

We have witnessed those risks become reality. During the H1N1 epidemic in 2009, prisons and jails dealt with a high volume of cases. (*Id.* at ¶22.) Already, China confirmed the rapid spread of the coronavirus in its prisons, counting 500 cases as of February 21st. (*Id.* at ¶23.) Secretary of State Mike Pompeo demanded the humanitarian release of Americans detained in an Iranian prison. (*Id.* at ¶24.) He said, “Reports that COVID-19 has spread to Iranian prisons are deeply troubling and demand nothing less than the full and immediate release of all American citizens.” He declared that “[t]heir detention amid increasingly deteriorating conditions defies basic human decency.” (*Id.*)

Other jurisdictions have acted to minimize these risks. Courts in Iran granted 54,000 inmates furlough to contain coronavirus across the country. (*Id.* at ¶25.) In the United States, several jurisdictions have released elderly and sick prisoners, and reduced jail populations by refusing the admission of individuals arrested on non-violent misdemeanor charges. (*Id.* at ¶26.) Los Angeles County is releasing certain inmates from custody to combat the spread of COVID-19. (*Id.* at ¶¶27, 31.) In the context of sentencing, federal judges have varied from the guidelines range to impose non-custodial sentences, in light of the risks of COVID-19. See *United States v. Dempsey*, 19-CR-236-JB-1 (S.D. Al. March 19, 2020) (sentencing 74-year-old defendant to five years of probation despite 30-month low end guideline range); *United States v. Guevera-Miranda, et al.*, 18-CR-00449-HZ (D. Or. March 16, 2020) (varying from bottom of guideline range, 12 months, to 3 years’ probation and 8 months of house arrest due to pandemic).

The government opposes this request. Decl. of Counsel, ¶ 35). But a coalition of elected U.S. district attorneys has argued for early releases. (*Id.*, ¶33). As the Los Angeles Times Editorial Board has opined, the spread of COVID-19 is a crisis not only for inmates and their families, but for our communities. Inmates “are part of our community, and we as a society are responsible for their safety during the period in which we have them locked up with no ability to practice the procedures that the rest of us do—the distancing, the handwashing.” (*Id.*). In addition, inmates are released every day to rejoin the rest of us. (*Id.*). Reducing the population of prisons and jails is a public health emergency.

In short, there are exceptional reasons why Ms. **CLIENT**—who poses no risk of flight or to public safety—should be released immediately.

Conclusion

For the foregoing reasons, this Court should reinstate Ms. **CLIENT**’s release on the same terms and conditions a previously imposed or such reasonable further conditions the Court views as necessary.

Respectfully submitted,

/s/ **ATTORNEY**