

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**FILED**

APR 9 2020

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

JEFF N. ROSE,

Petitioner-Appellant,

v.

RENEE BAKER, Warden; ATTORNEY  
GENERAL FOR THE STATE OF  
NEVADA,

Respondents-Appellees.

No. 17-15009

D.C. No.

3:13-cv-00267-MMD-WGC

District of Nevada,

Reno

ORDER

Before: WARDLAW and CLIFTON, Circuit Judges, and KATZMANN,\* Judge.

On September 24, 2019, this Court reversed in part the district court's denial of Petitioner Jeff Rose's habeas petition and remanded with instructions to conditionally grant the writ pending retrial. Dkt. 43. The State intends to file a petition for certiorari, which, after extensions granted by the U.S. Supreme Court, is due on April 24, 2020. On December 17, 2019, we stayed the mandate "for 90 days from the filing date of this order, pending the filing of a petition for writ of certiorari in the Supreme Court," pursuant to Federal Rule of Appellate Procedure 41. Dkt. 54. Presently before the Court is Petitioner's emergency motion for release on bond pending appeal under Federal Rule of Appellate Procedure 23,

---

\* The Honorable Gary S. Katzmann, Judge for the United States Court of International Trade, sitting by designation.

which relies in large part on the recent COVID-19 outbreak and Rose’s increased individualized risk factors that make him particularly vulnerable to the disease, with potentially fatal consequences.<sup>1</sup> Dkt. 59.

Because the State is appealing from our decision ordering the district court to conditionally grant the writ of habeas corpus, Rose’s motion for release is governed by Federal Rule of Appellate Procedure 23(c). *Hilton v. Braunskill*, 481 U.S. 770, 772, 774 (1987) (treating a conditional writ of habeas corpus as falling within Rule 23(c)); *Marino v. Vasquez*, 812 F.2d 499, 508 (9th Cir. 1987) (“Rule 23 establishes the authority of the federal courts to release both successful and unsuccessful habeas petitioners pending appeal.”).

When “confronted with the question of whether a prevailing habeas petitioner should be released pending the [Supreme] Court’s disposition of the State’s petition for certiorari” under Rule 23(c), the following factors guide the court’s determination: “(1) whether [the state] has made a strong showing that [it]

---

<sup>1</sup> The unprecedented spread of COVID-19 is “a global crisis . . . that is heightened” for state prisoners, one of “the most vulnerable groups among us.” *Coleman v. Newsom*, \_\_ F. Supp. 3d \_\_, 2020 WL 1675775 (E.D. Cal/N.D. Cal. 2020). The state of Nevada declared a state of emergency in response to COVID-19 on March 12, 2020, and President Trump declared a national state of emergency one day later. The exigency of the COVID-19 pandemic has grounded the release or temporary release of several inmates and immigrant detainees in certain circumstances. *See, e.g., United States v. Garcha*, No. 19-cr-00663 EJD-1 (VKD), 2020 WL 1593942, at \*3 (N.D. Cal. Apr. 1, 2020); Temporary Restraining Order and Order to Show Cause, *Bravo Castillo v. Barr*, No. CV 20-00605 TJH (AFMx) (C.D. Cal. March 27, 2020).

is likely to succeed on the merits; (2) whether the [state] will be irreparably injured [if the petitioner is released]; (3) whether [denial of release] will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Hilton*, 481 U.S. at 776–777; *O’Brien v. O’Laughlin*, 557 U.S. 1301, 1302 (2009) (Breyer, J., acting in his capacity as Circuit Justice for the First Circuit).

The State’s opposition to Rose’s motion for release does not meaningfully contest that these factors weigh in favor of release. With regard to the first factor, the State has not yet filed a petition for certiorari, but, having examined its tentative arguments (previously outlined in the State’s motion to stay the mandate), we find it is not reasonably likely that the Supreme Court will grant the petition or reverse the decision below. *See O’Brien*, 557 U.S. at 1302–03. As to the remaining factors, releasing Rose on bail will not prevent the State from retrying Rose, and the State has not disputed that Rose’s release does not pose a potential flight risk or danger to the public. *See id.* Rose can live with his son if released, and imposing conditions of release can further mitigate any potential harm to the State or the public. In contrast, the State has not disputed that Rose faces greater risk of serious consequences from the COVID-19 virus, up to and including death, because of his underlying medical conditions.

Accordingly, Petitioner’s motion for release under Federal Rule of Appellate

Procedure 23 is **GRANTED**. This case is remanded to the district court for the limited purpose of conducting a bond hearing to determine bond and other appropriate conditions for release.

**IT IS SO ORDERED.**

**No. 17-15009**

---

---

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

**Jeff N. Rose,**

Petitioner-Appellant,

v.

**Renee Baker, et al.**

Respondents-Appellees.

---

On Appeal from the United States District Court  
for the District of Nevada (Las Vegas)  
District Court Case No. 3:13-cv-00267-MMD-WGC,  
Honorable Miranda M. Du, United States District Judge

---

**Amended Emergency Motion Under Circuit Rule 27-3 for  
Release on Personal Recognizance Bond by April 9, 2020**

---

Rene L. Valladares  
Federal Public Defender,  
District of Nevada  
\* Amelia L. Bizzaro  
Assistant Federal Public Defender  
411 E. Bonneville Ave., Ste. 250  
Las Vegas, Nevada 89101  
(702) 388-6577  
Amelia\_Bizzaro@fd.org

\*Counsel for Jeff N. Rose

---

---

**CIRCUIT RULE 27-3 CERTIFICATE**

I certify the following:

The relief I request in the emergency motion that accompanies this certificate is for release of Petitioner-Appellant Jeff N. Rose on personal recognizance bond pending the completion of his appeal. Rose's health places him at a high risk for COVID-19, which, if contracted, could be fatal.

This Court granted Rose relief on September 24, 2019, but he remains in custody while Warden Renee Baker pursues a petition for writ of certiorari in the United States Supreme Court. Today, the U.S. Supreme Court issued an order automatically extending the time for filing a petition to 150 days from the date rehearing was denied,<sup>1</sup> making Baker's petition due April 24, 2020.<sup>2</sup> The same order notes that the Court will grant motions for extension "as a matter of course" if the grounds for the extension "are difficulties relating to COVID-19" and the request is reasonable.<sup>3</sup> Thus, it is likely that this process will take

---

<sup>1</sup> March 19, 2020 Order (available at <https://bit.ly/3df2Mwc>).

<sup>2</sup> *See* Dkt. 49 (de

<sup>3</sup> *Id.*

longer than usual, keeping Rose in custody the entire time. If relief is not granted within the requested time, Rose may contract COVID-19. Given his current diagnoses of sleep apnea, congestive heart failure, and hypertension,<sup>4</sup> he is at a high risk for COVID-19, which could be fatal for him.

Relief is needed as soon as possible, but no later than April 9, 2020.

This motion could not be filed earlier because COVID-19 is a new, constantly evolving threat to the health and safety of every person, but particularly to incarcerated people. Counsel filed a motion for Rose's release yesterday, the day after the governor effectively shut down the state of Nevada. The Supreme Court Order was issued today and counsel realized she should have filed Rose's motion as an Emergency Motion. She has amended the motion to include information about the Supreme Court's Order. That motion follows this certificate. Counsel

---

<sup>4</sup> See NVOAG000198. Claims about Rose's medical conditions are based on his medical records provided by the Nevada Department of Corrections to counsel on November 22, 2019. Counsel can provide a sealed copy as required by this Court.

seeks to have this amended, emergency motion replace the motion she filed yesterday.

I have not requested this relief in the district court because the district court does not currently have jurisdiction. *See Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir. 2004).

I have notified the Ninth Circuit staff via e-mail about filing this motion.

I notified and served Deputy Attorney General Charles L. Finlayson, counsel for Respondents, by e-mail on March 19, 2020 about this motion. He opposes release.

The best contact information for each counsel is:

Charles L. Finlayson  
Deputy Attorney General  
100 North Carson Street  
Carson, City, NV 89701-4717  
(775) 684-1115  
[CFinlayson@ag.nv.gov](mailto:CFinlayson@ag.nv.gov)

Amelia L. Bizzaro  
Assistant Federal Public Defender  
411 E. Bonneville Ave., Ste. 250  
Las Vegas, NV 89128  
(702) 388-5105  
[Amelia\\_bizzaro@fd.org](mailto:Amelia_bizzaro@fd.org)

I declare under penalty of perjury that the foregoing is true.

Dated March 19, 2020.

/s/ Amelia L. Bizzaro

Amelia L. Bizzaro  
Assistant Federal Public Defender



## INTRODUCTION

Petitioner Jeff Rose has been fighting the allegations against him for 17 years, mostly while in custody.<sup>5</sup> His fight is nearly complete—on September 24, 2019, this Court granted him relief and remanded his case to the district court “with instructions to conditionally grant the writ pending a new trial.”<sup>6</sup> But Warden Renee Baker is not done with this appeal. She has successfully obtained a stay of the mandate<sup>7</sup> and originally had to file a petition for writ of certiorari in the United States Supreme Court by March 25, 2020.<sup>8</sup> That deadline is now April 24, 2020 based on a new Order the Supreme Court issued today in response to COVID-19.<sup>9</sup> Meanwhile, Rose remains incarcerated, something that has become incredibly dangerous for him in light of the COVID-19 pandemic and his specific health concerns. Accordingly, Rose respectfully asks

---

<sup>5</sup> EOR 2501, 144-145.

<sup>6</sup> *Id.* at 7.

<sup>7</sup> Dkt. 54. Rose opposed the mandate and, in the alternative, asked for his release under Fed. R. App. P. 23(a). *See* Dkt. 51. This Court denied Rose’s request. Dkt. 54.

<sup>8</sup> *See Baker v. Rose*, No. 19A915 (docket available at <https://bit.ly/2UhQJFN>). On February 20, 2020, Justice Kagan extended the warden’s time to file her petition until March 25, 2020. *Id.*

<sup>9</sup> March 19, 2020 Order (available at <https://bit.ly/3df2Mwc>).

this Court to release him on bond pending appeal under FED. R. APP. P. 23(a). *See also* 18 U.S.C. § 3143(b).

## ARGUMENT

### **I. The warden cannot overcome the presumption in favor of Rose’s release.**

Rose should not have to remain in prison while Baker pursues a certiorari petition during a global pandemic, especially where, as here, there is a presumption of release. *See O’Brien v. O’Laughlin*, 557 U.S. 1301 (2009); *see also Hilton v. Braunskill*, 481 U.S. 770, 774 (1987) (“Rule 23(c) undoubtedly creates a presumption of release from custody in such cases ....”).

#### **A. Rose is at a high risk for contracting COVID-19.**

Rose is among the group of people the Centers for Disease Control and Prevention categorizes as being the most at-risk for contracting COVID-19, a dangerous virus rapidly spreading across the world and Nevada. Rose has a heightened risk of contracting severe forms of the virus because of his medical conditions.<sup>10</sup> He suffers from sleep apnea,

---

<sup>10</sup> CDC, *If You Are at Higher Risk* (last visited March 18, 2020) (available at <https://bit.ly/2UhHAwT>).

requiring special equipment for him to sleep safely, congestive heart failure, and hypertension.<sup>11</sup> He also recently recovered from oral cancer, and is wheel-chair bound.<sup>12</sup>

**B. Rose’s continued incarceration puts him at a much greater risk to contract COVID-19 and once he does, the prison is ill-equipped to treat him.**

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.”<sup>13</sup> 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.<sup>14</sup> In China,

---

<sup>11</sup> See NVOAG000198. Claims about Rose’s medical conditions are based on his medical records provided by the Nevada Department of Corrections to counsel on November 22, 2019. Counsel can provide a sealed copy as required by this Court.

<sup>12</sup> *Id.*

<sup>13</sup> *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*, signed by over 800 health experts and agencies (March 2, 2020) (available at <https://bit.ly/2W9V6oS>).

<sup>14</sup> The Verge, *Prisons and Jails are Vulnerable to COVID-19 Outbreaks* (Mar. 7, 2020) at <https://bit.ly/2TNcNZY>

officials have confirmed the coronavirus spreading at a rapid pace in Chinese prisons, counting 500 cases.<sup>15</sup>

The coronavirus outbreak has reached correctional institutions in the United States.<sup>16</sup> Jails and prisons around the country have instituted measures to keep the coronavirus at bay.<sup>17</sup> And courts and correctional institutions have started releasing inmates to halt the virus's spread, which would be catastrophic in a prison setting.<sup>18</sup> Given

---

<sup>15</sup> The Business Insider, *Chinese Jails Have Become Hotbeds of Coronavirus As More Than 500 Cases Have Erupted, Prompting the Ouster of Several Officials* (Feb. 21, 2020) (available at <https://bit.ly/2vSzSRT>).

<sup>16</sup> Mark Sundstrom, *Inmate at Nassau County jail tests positive for coronavirus: officials* (March 16, 2020) (available at <https://bit.ly/3daUIws>).

<sup>17</sup> The Marshall Project, *Tracking Prisons' Response to Coronavirus* (March 17, 2020; updated March 18, 2020) (available at <https://bit.ly/2IXeZHT>).

<sup>18</sup> LA Times, *To halt coronavirus, L.A. County cuts jail population* (March 16, 2020) (available at <https://lat.ms/2w8La4A>); Fox News, *Iran releases 85,000 inmates as coronavirus sweeps through prisons: 'we're all ill'* (March 17, 2020) (available at <https://fxn.ws/2U2LHhA>); Fox 2 KTVU, *Santa Clara Co. Sheriff releases 6 inmates early to slow spread of coronavirus* (May 18, 2020) (available at <https://bit.ly/38Zoz7J>); CNN, *Cities in the US move to lower inmate populations as coronavirus fears grow* (March 16, 2020) (available at <https://cnn.it/2vxdz3V>); The Spokesman-Review, *Dozens released from Spokane County custody*

the rapid spread across the world, it's only a matter of time before the coronavirus is found inside the Nevada Department of Corrections.<sup>19</sup> On March 17, 2020, Governor Steve Sisolak ordered a statewide shutdown of nonessential business.<sup>20</sup> Outside of hospitals, jails and prisons are among the only places left with large groups of people. Prison conditions create the ideal environment for the transmission of a contagious disease, like COVID-19.<sup>21</sup> And a coronavirus outbreak in such a confined setting, with already extremely limited prison healthcare, would be catastrophic.<sup>22</sup> For Rose and his specific health conditions, it

---

*following Municipal Court emergency order* (March 17, 2020) (available at <https://bit.ly/3a0JSHx>).

<sup>19</sup> See New York Times, *'We Are Not a Hospital': A Prison Braces for the Coronavirus* (March 17, 2020, updated March 18, 2020) (available at <https://nyti.ms/3a3nzkr>). The article reports positive cases in a Washington state prison, a Hancock (Ind.) jail, and Sing Sing Correctional Facility in New York.

<sup>20</sup> Las Vegas Review-Journal, *Sisolak announces closure of all nonessential businesses* (March 17, 2020) (available at <https://bit.ly/3a1sDWd>).

<sup>21</sup> Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 CLINICAL INFECTIOUS DISEASES 1047, 1047-1055 (2007) (available at <https://doi.org/10.1086/521910>).

<sup>22</sup> See New York Times, *'We Are Not a Hospital': A Prison Braces for the Coronavirus* (March 17, 2020, updated March 18, 2020) (available at <https://nyti.ms/3a3nzkr>).

could be deadly.<sup>23</sup>

**C. Releasing Rose decreases the impact on the prison.**

Releasing Rose will not only protect him from the risk of infection when the coronavirus outbreak inevitably makes its way into the Nevada Department of Corrections, but also avoids the unavoidable impact upon the quality of the medical care he requires by taxing an already taxed system.<sup>24</sup> Former chief medical officer of the New York City jail system, Homer Venters, told Mother Jones that managing a COVID-19 outbreak in the prison system was “simply almost impossible.”<sup>25</sup> “For jails and prisons that are already filthy, and have, generally speaking, a low standard of clinical care, and are trained to

---

<sup>23</sup> CardioSmart, American College of Cardiology, *Heart Patients Warned of Risks from Coronavirus* (March 13, 2020) (available at <https://bit.ly/2QsiFpr>).

<sup>24</sup> U.S. Dep’t of Justice, Bureau of Justice Statistics, Laura M. Maruschak, Marcus Berzofsky, and Jennifer Unangs, *Medical Problems of State and Federal Prisoners and Jail Inmates*, 2011-2012 at 1-22 (Feb. 2015) (available at <https://bit.ly/2WpPiI7>).

<sup>25</sup> Mother Jones, *To Arrest the Spread of Coronavirus, Arrest Fewer People*, (March 12, 2020) (available at <https://bit.ly/2w92JS4>). These quotes were repeated in The Appeal, *Sentenced to COVID-19* (March 12, 2020) (available at <https://bit.ly/2Ugm3ER>).

take care of one person at a time...this will be a very, very difficult process.”

By any definition, Rose is at a high risk for serious illness from COVID-19 because of his heart disease, among his other conditions.<sup>26</sup> 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” because “infection control is challenging in these settings.”<sup>27</sup> In order to reduce the impact of COVID-19 on jails and prisons, experts advise against incarcerating people, like Rose, who are not a public safety risk. Tyler Winkelman, co-director of the Health, Homelessness, and Criminal Justice Lab at the Hennepin Healthcare Research Institute in Minneapolis, advises “we are increasing [the detainees] health risk by

---

<sup>26</sup> CDC, *If You Are at Higher Risk* (last visited March 18, 2020) (available at <https://bit.ly/2UhHAwT>).

<sup>27</sup> *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*, Sent on March 2, 2020, and signed by over 800 health experts and agencies and, available at <https://bit.ly/2W9V6oS> (last visited March 17, 2020).

keeping them [incarcerated] . . . [t]his is the time to make sure we have as few people at risk as possible.”<sup>28</sup>

The protective measures necessary to avoid COVID-19 simply aren’t available to Rose, or any inmate for that matter. And while healthy inmates can weather the virus if they get it, Rose may not be able to. He can only wash his hands when prison officials allow it. He can’t avoid touching high-touch surfaces because everything is a high-touch surface. And he can’t avoid crowds or even clean and disinfect his living space because that, too, is controlled by the prison.<sup>29</sup>

**D. Rose does not present a danger to the community.**

For anyone to get sick is terrible, but for Rose it would be a tragedy because he doesn’t belong in prison any longer. The first time Rose went to trial, he represented himself and the jury acquitted him or hung on all 66 counts.<sup>30</sup> It wasn’t a fluke that Rose convinced the jury to

---

<sup>28</sup> *Prisons and Jails are Vulnerable to COVID-19 Outbreaks, The Verge*, (Mar. 7, 2020) (available at <https://bit.ly/33qGcfC>).

<sup>29</sup> *See id.*, regarding everyday precautions.

<sup>30</sup> EOR 1078 at 22-23 (acquitting Rose of all the counts related to D.A. and Z.V., counts 1-25 and 66); EOR 1078 at 23 (hanging on counts 26-65, related to A.C. and C.C.).



acquit or hang. Even the judge thought the case against Rose was “the shittiest case on the face of the earth.”<sup>31</sup> Still, the state insisted on a re-trial on the hung counts and it got a windfall when a new judge stepped in for the second trial and gutted Rose’s defense. Even so, Rose, this time represented by counsel, was acquitted of all of the counts involving A.C. and all of the lewdness counts involving C.C., but convicted of all of the sexual assault counts involving C.C.<sup>32</sup>

The only reason Rose remains in custody today is because Baker has opted to seek certiorari review of this Court’s decision. Six months ago, this Court concluded that the state trial court’s decision before the second trial excluding all of the evidence relating to D.A. and Z.V. or the results of the first trial denied him a “meaningful opportunity to present a complete defense,” and was contrary to clearly established federal law.<sup>33</sup> Baker already received one extension for filing her petition, but that request may be rendered obsolete in light of the

---

<sup>31</sup> EOR 1339.

<sup>32</sup> EOR 2427-2435.

<sup>33</sup> Dkt. 43-1 at 7, *quoting Crane*, 476 U.S. 683, 690 (1986).

Supreme Court’s Order today extending the time for filing petitions by 150 days.<sup>34</sup> That makes Baker’s petition due April 24, 2020.<sup>35</sup> But the same order notes that it will grant motions for extension “as a matter of course” if the grounds for the extension “are difficulties relating to COVID-19” and the request is reasonable.<sup>36</sup> Thus, it’s possible that Baker won’t file her petition until even later. But even if she files it on time or even early, it’s clear that the certiorari process will take much longer than usual—not only are petitions being delayed, but the Court has also canceled oral arguments for the time being.<sup>37</sup>

Rose shouldn’t be subject to greater risk from this deadly and fast-moving pandemic in light of the procedural posture of this case and Rose’s likelihood of success upon release. He poses no danger to the safety of others or the community if released, nor is he likely to flee.

---

<sup>34</sup> March 19, 2020 Order (available at <https://bit.ly/3df2Mwc>).

<sup>35</sup> *See* Dkt. 49 (de

<sup>36</sup> *Id.*

<sup>37</sup> Reuters, *U.S. Supreme Court postpones arguments amid coronavirus worries* (March 16, 2020) (available at <https://reut.rs/39ZuGKI>).

Rose has no prior criminal history that suggests he would be a danger to the community. Indeed, the opposite is true. Rose is a Navy veteran who was discharged when he was injured. His service in the Navy and his injury was an issue at trial. He proved he couldn't have committed some of the counts against him because he was out of town as part of his Naval service.<sup>38</sup> And he proved he couldn't have committed other counts because of his injury.<sup>39</sup>

Upon his release, Rose will live with his married son and will avail himself of the veteran's benefits to which he is entitled, including healthcare and his pension. As explained in his Opposition to the warden's Motion to Stay the Mandate, there is little chance the warden's petition will be granted.<sup>40</sup> Rose is invested in seeing this case through and to having the type of trial originally denied him. Having proved his innocence on 46 counts already, he looks forward to his new trial on the remaining counts. Accordingly, the public interest favors Rose's release.

---

<sup>38</sup> EOR 1062 at 133.

<sup>39</sup> EOR 1062 at 133, EOR 1020 at 105-106.

<sup>40</sup> See Dkt. 51.

## CONCLUSION

We are living in unprecedented times. This global pandemic poses a real threat to Rose's health. The warden cannot overcome the presumption in favor of Rose's release in light of the current situation. Because this Court has granted him habeas relief, this Court should permit Rose to stay with his family, where he will be safe and well-cared for, until his appeal is complete. He is not a danger to the community and conditions, such as a personal recognizance bond, exist that ensure his appearance at future proceedings. Accordingly, Rose respectfully asks this Court to grant him bond pending the conclusion of his appeal.

Dated March 19, 2020.

Respectfully submitted,

Rene L. Valladares  
Federal Public Defender

*/s/ Amelia L. Bizzaro*

---

Amelia L. Bizzaro  
Assistant Federal Public Defender

CA NO. 17-15009  
IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JEFF N. ROSE,

Petitioner-Appellant,

vs.

RENEE BAKER, Warden; ATTORNEY  
GENERAL FOR THE STATE OF  
NEVADA,

Respondents-Appellees.

D.C. No. 3:13-00267-MMD-WGC  
(Nevada, Reno)

**OPPOSITION TO EMERGENCY MOTION FOR RELEASE**

**ARGUMENT**

Jeff N. Rose argues that as a result of the global COVID-19 pandemic, complicated by his personal health issues, this Court should release him on personal recognizance bond. Dkt. 58.

Rose previously sought release under Federal Rule of Appellate Procedure 23(c). Dkt. 51 at 9. This Court denied Rose's request and granted Respondents' request to stay its mandate in this matter. Dkt. 54.

While the world is undoubtedly grappling with a new health emergency that arose after this Court denied Rose's prior request, the law has not changed. Like his last request, Rose's emergency motion for release is based on his assertion that there

is a presumption of his release under Fed. R. App. P. 23(c). Dkt. 58 at 3. That rule has no application here: Rule 23(c) allows for release when “a decision ordering the release of a prisoner is under review.”<sup>1</sup> This Court did not order Rose’s release. This Court issued a memorandum opinion that directs the district court to enter a conditional writ that gives the State an opportunity to retry Rose. Dkt. 48 at 7.<sup>2</sup> This Court should therefore deny Rose’s request for relief based on Rule 23(c).

Moreover, the Nevada Department of Corrections already adopted policies and procedures designed to mitigate any concerns that inmates will contract the COVID-19 virus. *See* Exhibit A. Such steps included, but were not limited to, suspending all inmate visitation and limiting legal visitation to video only, assessing the temperature of all individuals entering NDOC facilities and denying access to anyone with a temperature greater than 100.3, conducting town hall meetings with staff and inmates at every NDOC institution to advise them on the crisis and prevention methods, and forming a COVID-19 team led by NDOC’s medical director to provide an ongoing assessment of the crisis. *Id.* While no one, inmate or not, can be assured that they

///

///

---

<sup>1</sup>Rose also argues that release is warranted pursuant to Fed. R. App. P. 23(a), which involves the transfer of custody. Dkt. #58 at 2.

<sup>2</sup> Respondents intend to seek review of that decision in the United States Supreme Court.

will not contract COVID-19, Respondents are confident that the steps taken by NDOC will reduce the likelihood that Rose or anyone else contracts the virus in an NDOC facility.

RESPECTFULLY SUBMITTED this 27th day of March, 2020.

AARON FORD  
Attorney General

By: /s/ Charles L. Finlayson  
CHARLES L. FINLAYSON (Bar No. 13685)  
Senior Deputy Attorney General  
State of Nevada  
Office of the Attorney General  
100 North Carson Street  
Carson City, Nevada 89701-4717  
Telephone: (775) 684-1115  
Fax: (775) 684-1108  
*Attorney for Respondent*

**CERTIFICATE OF SERVICE**

I certify that I am an employee of the Office of the Attorney General and that on this 27th day of March, 2020, I served a copy of the foregoing **OPPOSITION TO EMERGENCY MOTION FOR RELEASE**, by Ninth Circuit ECF electronic filing to:

Ryan Norwood  
Amelia L. Bizzaro  
Assistant Federal Public Defenders  
411 E. Bonneville Ave., Suite 250  
Las Vegas, Nevada 89101

/s/ Amanda White



# EXHIBIT A

# EXHIBIT A

Northern Administration  
5500 Snyder Ave.  
Carson City, NV 89701  
(775) 977-5500

Southern Administration  
3955 W. Russell Rd.  
Las Vegas, NV 89118  
(702) 486-9906



Steve Sisolak  
Governor

Charles Daniels  
Director

## State of Nevada Department of Corrections

March 16, 2020

**TO:** All Employees  
  
**FROM:** Charles Daniels, Director  
**SUBJECT:** DIRECTOR'S UPDATE IN RESPONSE TO COVID-19

---

Consistent with national and state health and human services protocols, protecting your health and safety is my top priority. With the issuance of the Governor's emergency declaration we are armed with additional tools and the flexibility to respond to and ultimately contain COVID-19.

With the activation of the State Emergency Operations Center and our Nevada Health Response team, a one stop COVID-19 information website was created to avail you of rapidly developing data, guidance and news impacting you, your family, co-workers and the community. You can access the website here: <https://nvhealthresponse.nv.gov/>. NDOC has been actively participating in the fight against COVID-19 and exploring ways to mitigate the impact to our State and its citizens.

Here are the current measures we have already implemented with public, staff and inmate safety in mind:

- Suspended all inmate visitation;
- Legal visitation modified to video only;
- Town Hall meetings conducted and scheduled with staff and inmates at every institution;
- Suspended volunteers and external service provider entry into our facilities;
- Commenced symptom detection protocols to include visual observation of influenza-like symptoms and assessment of body temperature of all individuals entering our facilities. For anyone with a temperature greater than 100.3, will be denied entry and instructed to see a community health care provider immediately;
- Suspended all inmate access to the community;
- Activated an Emergency Operation Center at each facility. The hours of operation are 5 a.m. – 12 a.m. daily, until further notice.

I extend my thoughts and prayers to the victims, families, and friends who have been impacted by COVID-19. This has been a challenging time for all of us, and I just want you to know how much I appreciate your patience, resolve and your selfless determination to protect the public and one another.

There is no one-size-fits-all approach to how we address this issue, and this is a rapidly developing situation that we will continue to monitor. All options are on the table to ensure the safety of you and your families.

Please remember to monitor and educate those with an underlying serious or long-term medical condition. Please take additional actions to reduce their risk of getting sick with this virus.

I strongly urge you to:

- Conduct an inventory check of personal items recommended to aid in the fight against COVID-19. Gather extra supplies such as soap, tissue, alcohol-based hand sanitizer and basic pantry staples.
- Make a list of emergency contacts to have on hand—family, friends, neighbors, carpool drivers, health care providers, teachers, employers, local public health department and community resources to include relevant websites.

Perform normal everyday precautions to try to avoid getting sick and avoid people who are sick and wash your hands often.

I have formed a team led by Dr. Minev, NDOC's Medical Director. This group has been directed to provide me with ongoing assessment results and recommendations specific to keeping our staff safe.

Should you have any additional questions or concerns, please work through your immediate chain of command.

Thank you

**No. 17-15009**

---

---

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

**Jeff N. Rose,**

Petitioner-Appellant,

v.

**Renee Baker, et al.**

Respondents-Appellees.

---

On Appeal from the United States District Court  
for the District of Nevada (Las Vegas)  
District Court Case No. 3:13-cv-00267-MMD-WGC,  
Honorable Miranda M. Du, United States District Judge

---

**Reply in Support of Amended Emergency Motion Under Circuit  
Rule 27-3 for Release on Personal Recognizance Bond**

---

Rene L. Valladares  
Federal Public Defender,  
District of Nevada  
\*Amelia L. Bizzaro  
Assistant Federal Public Defender  
411 E. Bonneville Ave., Ste. 250  
Las Vegas, Nevada 89101  
(702) 388-6577  
Amelia\_Bizzaro@fd.org

\*Counsel for Jeff N. Rose

---

## ARGUMENT

Warden Renee Baker doesn't dispute that Jeff Rose is not a danger to the community and that his specific health conditions make him a high risk for contracting a severe form of the coronavirus. But, she opposes his motion for release anyway. Baker argues—without authority—that Rule 23 doesn't apply and that even if it did, the Nevada Department of Corrections has adopted policies “designed to mitigate any concerns that inmates will contract the COVID-19 virus.”<sup>1</sup> Baker is wrong about Rule 23 and the policies NDOC has adopted aren't enough to combat this incredibly contagious virus. Accordingly, this Court should grant Rose's motion, impose a personal recognizance bond, and allow him to move in with his son, where he will be much safer than he is now.

### **I. Rule 23 authorizes the relief Rose seeks.**

Rule 23(c) “creates a presumption of release from custody” in cases where a federal court has granted habeas relief and the review of that decision is pending. *Hilton v. Braunskill*, 481 U.S. 770, 774 (1987). The

---

<sup>1</sup> Dkt. 60-1 at 2.

rule specifically says:

While a decision ordering the release of a prisoner is under review, the prisoner must—unless the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise—be released on personal recognizance, with or without surety.

FED. R. APP. P. 23(c). In setting the terms of release, the Court has discretion to require surety. In such a case, “[t]he bail imposed must be a practicable amount that respondent can reasonably be expected to raise.” *O’Brien v. O’Laughlin*, 557 U.S. 1301 (2009) (Breyer, J., in chambers). Here, Rose seeks a personal recognizance bond.

Baker argues that Rule 23 doesn’t apply because this Court reversed the denial of habeas relief, which isn’t the same as a decision “ordering the release.”<sup>2</sup> She offers no support for this position.

At the outset, there can be no question that this Court’s decision was in fact the functional equivalent of a habeas grant, which is to say: an order granting release. This Court “affirmed in part, reversed in part, and remanded with instructions to conditionally grant the writ

---

<sup>2</sup> Dkt. 60-1 at 2.

pending a new trial.”<sup>3</sup> Thus, there is no difference between this Court’s order in this case and a habeas grant. And a habeas grant—in every case—is an order to release the prisoner. *See Taylor v. Egeler*, 575 F.2d 773, 773 (1978) (per curiam) (the literal meaning “comes from Latin habeas corpus which means ‘you should have the body.’”). “If granted, the writ orders the jailer or other custodian to produce the body and free the prisoner either absolutely or conditionally.” *Id.*

Under Baker’s limited reading of Rule 23, Rose can only seek release in the district court once it grants the writ. But surely Baker doesn’t dispute that Rose could have sought release in this Court before it decided his appeal under 18 U.S.C. § 3143(b). Because Rose *won his case* and this Court didn’t explicitly grant the writ and order him released like it did in *Jones v. Eyman*, 353 F.2d 528 (9th Cir. 1965), Baker is saying Rose can’t seek release until Baker finishes litigating her cert petition, whenever that may be.

Baker’s position requires a technical, limited reading of Rule 23 that serves to punish the rare appellant who obtains habeas relief in

---

<sup>3</sup> Dkt. 43-1 at 7.

the Circuit after being denied relief in the district court. Rose couldn't find any cases that support this position and Baker didn't offer any.

Baker's argument fails. Rule 23—and it's presumption apply.

## **II. NDOC's approach to combatting COVID-19 won't prevent infections.**

The novel coronavirus is already starting to infiltrate the prison population, and outbreaks are likely to get much worse over time. The Federal Bureau of Prisons recently reported the first death of an inmate due to COVID-19.<sup>4</sup> That was followed quickly by news that four prisoners at a single federal prison in Louisiana,<sup>5</sup> and two in Ohio<sup>6</sup> have died. State prisoners in Massachusetts<sup>7</sup> and New York have also died.<sup>8</sup>

---

<sup>4</sup> Forbes, *COVID-19 Takes Life of Federal Inmate in Louisiana*, (Mar. 29, 2020) (available at <https://bit.ly/2w0ZZpJ>).

<sup>5</sup> The Lens, *Four confirmed coronavirus deaths at Louisiana federal prison* (April 2, 2020) (available at <https://bit.ly/3bQ9IhW>).

<sup>6</sup> The Plain Dealer, *Second inmate dies at federal prison in Ohio as coronavirus rips through lockups* (April 3, 2020) (available at <https://bit.ly/2R7RT63>).

<sup>7</sup> The Enterprise, *Prisoner with coronavirus at Bridgewater prison dies* (April 2, 2020) (available at <https://bit.ly/2wQWenh>).

<sup>8</sup> New York Post, *First New York prisoner with coronavirus dies at Sing Sing* (April 2, 2020) (available at <https://bit.ly/3aGpFah>).



Here in Nevada, at least one prison staff member at High Desert State Prison has tested positive.<sup>9</sup> The positive test at High Desert was reported the same day that Rose filed his emergency motion.

NDOC's approach to the coronavirus comes down to limiting outside visitors and taking the temperature of staff who work in the prison.<sup>10</sup> But those steps alone aren't enough. By the time a fever is detected, it's too late. "As many as 25 percent of people infected with the new coronavirus may not show symptoms," according to the director of the CDC, "a startlingly high number that complicates efforts to predict the pandemic's course and strategies to mitigate its spread."<sup>11</sup> In view of the exponential growth of infections throughout the world, throughout the country, and throughout Nevada—coupled with the unique vulnerabilities of prison institutions—it's highly likely Nevada prisons

---

<sup>9</sup> Nevada Independent, *Fear of coronavirus in prisons grow as Nevada confirms first COVID-19 case behind bars* (Mar. 27, 2020) (available at <https://bit.ly/3dM5yJN>).

<sup>10</sup> Dkt. 60-2 at 2.

<sup>11</sup> The New York Times, *Infected but Feeling Fine: The Unwitting Coronavirus Spreaders* (March 31, 2020) (available at <https://nyti.ms/2wZTG6c>).

will begin suffering from major outbreaks in the all-to-near future.

NDOC also lists regularly scheduled Town Hall meetings as among its policies to combat the spread of the virus.<sup>12</sup> At recent meetings that Rose attended, a lieutenant told the inmates that the coronavirus's arrival at the prison was inevitable, but that NDOC staff and guards—not prisoners—would be the priority for treatment. Officials told Rose and other inmates that there were no confirmed cases at Lovelock Correctional, but there were three confirmed cases at High Desert and more than 40 inmates in quarantine.<sup>13</sup> Rose believes there are possibly four inmates currently quarantined in Lovelock's medical unit—a medical unit without a doctor.<sup>14</sup>

---

<sup>12</sup> Dkt. 60-1 at 2.

<sup>13</sup> This information isn't yet being reported in the news media, which is counsel's only way of confirming it. NDOC is not sharing information with the Federal Public Defender proactively about the rate of infection within its institutions, even though the FPD represents several hundred inmates incarcerated in the Nevada Department of Corrections.

<sup>14</sup> Rose learned there was no doctor three weeks ago when his medical appointment at Lovelock turned out to be with a doctor at Northern Nevada Correctional Center by videoconference. Counsel reached out to one of NDOC's attorneys for confirmation of this, but didn't receive a response by the time of filing.

As Dr. Brie Williams explains in the attached affidavit, the risk of infection and accelerated transmission within jails and prisons is extraordinarily high.<sup>15</sup> Inmates have the highest risk of acute illness and poor health outcomes if infected.<sup>16</sup> Prisoners are often “housed cheek-by-jowl, in tightly-packed and poorly-ventilated dormitories; they share toilets, showers, and sinks; they wash their bedsheets and clothes infrequently; and often lack access to basic personal hygiene items.”<sup>17</sup> The institutions “lack the ability to separate sick people from well people and to quarantine those who have been exposed.”<sup>18</sup>

Rose is particularly vulnerable because of his health, something Baker doesn’t contest. In addition to suffering from sleep apnea, congestive heart failure, and hypertension, Rose also suffers from asthma. All of these conditions qualify him as high risk.<sup>19</sup> For people at

---

<sup>15</sup> Affidavit of Brie Williams, M.D. at 2.

<sup>16</sup> *Id.* at 3.

<sup>17</sup> Letter from Sandro Galea, MD, DrPH, et al., to President Trump (Mar. 27, 2020) (available at <https://bit.ly/39uc7x5>).

<sup>18</sup> *Id.*

<sup>19</sup> Centers for Disease Control and Prevention, *People Who Are At Higher Risk* (available at <https://bit.ly/2UQoFt9>). *See also* Harvard

higher risk, the death rates and rates of serious complications skyrocket. For example, the death rate for people with no underlying conditions is 0.9 percent, but the death rates for people with diabetes is 7.3 percent, and the death rates for people with cardiovascular disease, like Rose, is 10.5 percent.<sup>20</sup>

### **III. Rose poses no risk of danger to the community.**

Baker doesn't dispute Rose's assertion that he doesn't pose a danger to the community or oppose his plans to live with his son upon release.<sup>21</sup> To be sure, Rose has an overwhelming interest in clearing his name—something he's been trying to do since his arrest, and will appear at any future court hearings.

---

Health Publishing – Harvard Medical School, *If you are at higher risk* (Mar. 2020) (available at <https://bit.ly/2UuPq7G>).

<sup>20</sup> The Wall Street Journal, *Who's Most at Risk from the Coronavirus* (Mar. 14, 2020) (available at <https://on.wsj.com/2xAGYed>).

<sup>21</sup> Undersigned counsel has personally been in touch with Rose's son to confirm Rose's post-release living arrangements. Counsel did not obtain a sworn declaration from Rose's son because technological challenges prevented her from obtaining it quickly.

## CONCLUSION

Baker doesn't dispute that Rose's health makes him extremely vulnerable to a severe case of COVID-19, that he does not pose any risk to the community, or that he is unlikely to flee. Her sole objection is that Rule 23 doesn't apply. But as Rose has demonstrated here, it does, and so does the presumption of release. Rose shouldn't be subject to conditions that increase his likelihood of infection and possible death because he won relief in this Court as opposed to the district court. Accordingly, Rose respectfully asks this Court to grant him bond pending the conclusion of his appeal.

Dated April 3, 2020.

Respectfully submitted,

Rene L. Valladares  
Federal Public Defender

*/s/ Amelia L. Bizzaro*

---

Amelia L. Bizzaro  
Assistant Federal Public Defender

-----	X	
	:	
	:	
	:	
	:	
APPLICATION FOR RELEASE FROM CUSTODY	:	<b>AFFIDAVIT OF BRIE WILLIAMS, M.D.</b>
	:	
	:	
	:	
	:	
-----	X	

I, Brie Williams, hereby affirm as follows:

1. I am a doctor duly licensed to practice medicine in the State of California.
2. I am currently a Professor of Medicine at the University of California, San Francisco (“UCSF”) in the Geriatrics Division, Director of UCSF’s Amend: Changing Correctional Culture Program, as well as Director of UCSF’s Criminal Justice & Health Program. In that capacity, my clinical research has focused on improved responses to disability, cognitive impairment, and symptom distress in older or seriously ill prisoners; a more scientific development of compassionate release policies; and a broader inclusion of prisoners in national health datasets and in clinical research. I have developed new methods for responding to the unique health needs of criminal justice-involved older adults—including an evidence-based approach to reforming compassionate release policies and the design of a new tool to assess physical functioning in older prisoners. I was previously a consultant for the California Department of Corrections and Rehabilitation, as well as for other state prison systems.
3. I have extensive experience working with vulnerable populations, in particular the incarcerated and the elderly.

4. I submit this affidavit in support of any defendant seeking release from custody during the COVID-19 pandemic, so long as such release does not jeopardize public safety and the inmate can be released to a residence in which the inmate can comply with CDC social distancing guidelines. The statements in this affidavit are based only on the current state of emergency and the circumstances described below.

**The Risk of Infection and Accelerated Transmission of COVID-19 within Jails and Prisons is Extraordinarily High.**

5. Prisons and jails are not actually isolated from our communities: hundreds of thousands of correctional officers and correctional healthcare workers enter these facilities every day, returning to their families and to our communities at the end of their shifts, bringing back and forth to their families and neighbors and to incarcerated patients any exposures they have had during the day. Access to testing for correctional staff has been “extremely limited,” guards have reported a “short supply” of protective equipment, and prisons are not routinely or consistently screening correctional officers for symptoms.<sup>1</sup>

6. The risk of exposure is particularly acute in pre-trial facilities where the inmate populations shift frequently.<sup>2</sup> For example, despite the federal government’s guidance to stay

---

<sup>1</sup> Keegan Hamilton, *Sick Staff, Inmate Transfers, and No Tests: How the U.S. Is Failing Federal Inmates as Coronavirus Hits*, Vice (Mar. 24, 2020), [https://www.vice.com/en\\_ca/article/jge4vg/sick-staff-inmate-transfers-and-no-tests-how-the-us-is-failing-federal-inmates-as-coronavirus-hits](https://www.vice.com/en_ca/article/jge4vg/sick-staff-inmate-transfers-and-no-tests-how-the-us-is-failing-federal-inmates-as-coronavirus-hits).

*See also* Daniel A. Gross, “*It Spreads Like Wildfire*”: *The Coronavirus Comes to New York’s Prisons*, The New Yorker (Mar. 24, 2020), <https://www.newyorker.com/news/news-desk/it-spreads-like-wildfire-covid-19-comes-to-new-yorks-prisons>; Josiah Bates, ‘*We Feel Like All of Us Are Gonna Get Corona.*’ *Anticipating COVID-19 Outbreaks, Rikers Island Offers Warning for U.S. Jails, Prisons*, Time (Mar. 24, 2020), <https://time.com/5808020/rikers-island-coronavirus/>; Sadie, Gurman, *Bureau of Prisons Imposes 14-Day Quarantine to Contain Coronavirus*, WSJ (Mar. 24, 2020), <https://www.wsj.com/articles/bureau-of-prisons-imposes-14-day-quarantine-to-contain-coronavirus-11585093075>; Cassidy McDonald, *Federal Prison Workers Say Conflicting Orders on Coronavirus Response Is Putting Lives at Risk*, CBS News (Mar. 19, 2020), <https://www.cbsnews.com/news/coronavirus-prison-federal-employees-say-conflicting-orders-putting-lives-at-risk-2020-03-19/>.

<sup>2</sup> Emma Grey Ellis, *Covid-19 Poses a Heightened Threat in Jails and Prisons*, Wired (Mar. 24, 2020), <https://www.wired.com/story/coronavirus-covid-19-jails-prisons/>.

inside and many states' stay-in-place orders, many prosecutors are still arresting individuals and seeking detention.<sup>3</sup> Pre-trial detention facilities are still accepting new inmates who are coming from communities where COVID-19 infection is rampant. As of today's date, the Bureau of Prisons is still moving inmates from facility to facility, including prisoners in New York.<sup>4</sup>

7. Because inmates live in close quarters, there is an extraordinarily high risk of accelerated transmission of COVID-19 within jails and prisons. Inmates share small cells, eat together and use the same bathrooms and sinks. They eat together at small tables that are cleaned only irregularly. Some are not given tissues or sufficient hygiene supplies.<sup>5</sup> Effective social distancing in most facilities is virtually impossible, and crowding problems are often compounded by inadequate sanitation, such as a lack of hand sanitizer or sufficient opportunities to wash hands.<sup>6</sup>

**Inmate Populations Also Have the Highest Risk of Acute Illness and Poor Health Outcomes if Infected with COVID-19.**

8. There are more than 2.3 million people incarcerated in the United States<sup>7</sup>

---

<sup>3</sup> Stephen Rex Brown, *'Business as Usual' For Federal Prosecutors Despite Coronavirus, Nadler Writes, Calling for Release of Inmates*, N.Y. Daily News (Mar. 20, 2020), <https://www.nydailynews.com/new-york/ny-nadler-doj-inmates-20200320-d6hbdjcu5aitppi3ui2xz7tjy-story.html>.

<sup>4</sup> Courtney Bublé, *Lawmakers, Union Urge Halt to All Prison Inmate Transfers*, Government Executive (Mar. 25, 2020), <https://www.govexec.com/management/2020/03/lawmakers-union-urge-halt-all-prison-inmate-transfers/164104/>; Hamilton, *Sick Staff, Inmate Transfers*; Luke Barr, *Despite Coronavirus Warnings, Federal Bureau of Prisons Still Transporting Inmates*, ABC News (Mar. 23, 2020), <https://abcnews.go.com/Health/warnings-bureau-prisons-transporting-inmates-sources/story?id=69747416>.

<sup>5</sup> Justine van der Leun, *The Incarcerated Person Who Knows How Bad It Can Get*, Medium (Mar. 19, 2020), <https://gen.medium.com/what-its-like-to-be-in-prison-during-the-coronavirus-pandemic-1e770d0ca3c5> ("If you don't have money, you don't have soap or tissues."); Keri Blakinger and Beth Schwartzapfel, *How Can Prisons Contain Coronavirus When Purrell Is a Contraband?*, ABA Journal (Mar. 13, 2020), <https://www.abajournal.com/news/article/when-purrell-is-contraband-how-can-prisons-contain-coronavirus>.

<sup>6</sup> Rosa Schwartzburg, *The Only Plan the Prison Has Is to Leave Us To Die in Our Beds*, The Nation (Mar. 25, 2020), <https://www.thenation.com/article/society/coronavirus-jails-mdc/>.

<sup>7</sup> Kimberly Kindy et al., *'Disaster Waiting to Happen': Thousands of Inmates Released as Jails and Prisons Face Coronavirus Threat*, Washington Post (Mar. 25, 2020), [https://www.washingtonpost.com/national/disaster-waiting-to-happen-thousands-of-inmates-released-as-jails-face-coronavirus-threat/2020/03/24/761c2d84-6b8c-11ea-b313-df458622c2cc\\_story.html](https://www.washingtonpost.com/national/disaster-waiting-to-happen-thousands-of-inmates-released-as-jails-face-coronavirus-threat/2020/03/24/761c2d84-6b8c-11ea-b313-df458622c2cc_story.html).



approximately 16% of whom are age 50 or older.<sup>8</sup> The risk of coronavirus to incarcerated seniors is high. “Their advanced age, coupled with the challenges of practicing even the most basic disease prevention measures in prison, is a potentially lethal combination.”<sup>9</sup> To make matters worse, correctional facilities are often ill-equipped to care for aging prisoners, who are more likely to suffer from chronic health conditions than the general public.

9. An estimated 39-43% of all prisoners, and over 70% of older prisoners, have at least one chronic condition, some of the most common of which are diabetes, hypertension, and heart problems.<sup>10</sup> According to the CDC, each of these conditions—as well as chronic bronchitis, emphysema, heart failure, blood disorders, chronic kidney disease, chronic liver disease, any condition or treatment that weakens the immune response, current or recent pregnancy in the last two weeks, inherited metabolic disorders and mitochondrial disorders, heart disease, lung disease, and certain neurological and neurologic and neurodevelopment conditions<sup>11</sup>—puts them at a “high-risk for severe illness from COVID-19.”<sup>12</sup>

---

<sup>8</sup> Brie Williams *et al.*, *Strategies to Optimize the Use of Compassionate Release from US Prisons*, 110 *AJPH* S1, S28 (2020), available at <https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2019.305434>; Kimberly A. Skarupski, *The Health of America’s Aging Prison Population*, 40 *Epidemiologic Rev.* 157, 157 (2018), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5982810/>.

<sup>9</sup> Weihua Li and Nicole Lewis, *This Chart Shows Why the Prison Population is So Vulnerable to COVID-19*, The Marshall Project (Mar. 19, 2020), <https://www.themarshallproject.org/2020/03/19/this-chart-shows-why-the-prison-population-is-so-vulnerable-to-covid-19>.

<sup>10</sup> Brie A. Williams *et al.*, *How Health Care Reform Can Transform the Health of Criminal Justice-Involved Individuals*, 33 *Health Affairs* 462-67 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4034754/>; Brie A. Williams *et al.*, *Coming Home: Health Status and Homelessness Risk of Older Pre-release Prisoners*, 25 *J. Gen. Internal Med.* 1038-44 (2010), available at <https://link.springer.com/content/pdf/10.1007/s11606-010-1416-8.pdf>; Laura M. Maruschak *et al.*, *Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-12*, U.S. Dept of Justice (Oct. 4, 2016), at 5, available at <https://www.bjs.gov/content/pub/pdf/mpsfj1112.pdf>.

<sup>11</sup> Harvard Health Publishing, *Coronavirus Research Center*, Harvard Medical School (Mar. 25, 2020), <https://www.health.harvard.edu/diseases-and-conditions/coronavirus-resource-center>.

<sup>12</sup> Centers for Disease Control and Prevention, *Coronavirus Disease 2019: People Who Are at Higher Risk*, <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/people-at-higher-risk.html> (last updated Mar. 22, 2020).

10. However, even many young federal prisoners suffer from asthma, rendering them also very vulnerable to coronavirus.<sup>13</sup>

11. But it is not only the elderly, or those with preexisting medical conditions that are at risk of coronavirus in a correctional setting. As of March 23, 2020, New York City reported that “[p]eople ranging in ages from 18 to 44 have accounted for 46 percent of positive tests.”<sup>14</sup> Across the United States, 38% of those hospitalized are between the ages of 20 and 54 and 12% of the intensive care patients are between 20 and 44.<sup>15</sup>

12. This data is of particular concern for inmate populations, since prisoners’ physiological age *averages 10 to 15 years older* than their chronological age.<sup>16</sup> Therefore, the consensus of those who study correctional health is that inmates are considered “geriatric, by the age of 50 or 55 years.”<sup>17</sup> It is not clear that prison health care administrations are taking accelerated ageing into account when determining the eligibility criteria for age-related screening tools and medical care protocols for coronavirus, potentially leaving large swathes of the prison population at risk.<sup>18</sup>

---

<sup>13</sup> Laura Maruschak, *Medical Problems of Jail Inmates*, Dep’t of Justice (Nov. 2006), at p. 2, available at <https://www.bjs.gov/content/pub/pdf/mpji.pdf>.

<sup>14</sup> Kimiko de Freytas-Tamura, *20-Somethings Now Realizing That They Can Get Coronavirus, Too*, N.Y. Times (Mar. 23, 2020), <https://www.nytimes.com/2020/03/23/nyregion/nyc-coronavirus-young.html>.

<sup>15</sup> *Id.*

<sup>16</sup> Brie A. Williams *et al.*, *Aging in Correctional Custody: Setting a Policy Agenda for Older Prisoner Health Care*, 102 Am. J. Public Health 1475-81 (2012), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3464842/>; see also Brie Williams *et al.*, *Detained and Distressed: Persistent Distressing Symptoms in a Population of Older Jail Inmates*, 64 J. Am. Geriatrics Soc. 2349-55 (2016), <https://onlinelibrary.wiley.com/doi/pdf/10.1111/jgs.14310> (“For example, older jail inmates with an average age of 60 in this study reported poor or fair health [and] chronic lung disease . . . at rates similar to those reported by community-based lower income older adults with an average age of 72.”).

<sup>17</sup> Brie A. Williams *et al.*, *The Older Prisoner and Complex Chronic Medical Care* 165-70 in World Health Organization, *Prisons and Health* (2014), <https://pdfs.semanticscholar.org/64aa/10d3cff6800ed42dd152fcf4e13440b6f139.pdf>.

13. In one study, we found that inmates who died in hospitals were, on average, nearly two decades younger than non-incarcerated decedents, had significantly shorter hospitalizations, and had higher rates of several chronic conditions including cancer, liver disease and/or hepatitis, mental health conditions, and HIV/AIDS.”<sup>19</sup>

### **The Entire Community is at Risk If Prison Populations Are Not Reduced**

14. As the World Health Organization has warned, prisons around the world can expect “huge mortality rates” from Covid-19 unless they take immediate action including screening for the disease.<sup>20</sup>

15. As of March 24, 2020, at least 38 people involved in the New York City correctional system have tested positive for Covid-19.<sup>21</sup> Already, three inmates and three staff at federal correctional facilities across the United States have tested positive for the coronavirus, according to the Federal Bureau of Prisons.<sup>22</sup>

16. Jails and prisons are fundamentally ill-equipped to handle a pandemic.

17. Medical treatment capacity is not at the same level in a correctional setting as it is in a hospital. Some correctional facilities have no formal medical ward and no place to quarantine

---

<sup>18</sup> Brie A. Williams *et al.*, *Differences Between Incarcerated and Non-Incarcerated Patients Who Die in Community Hospitals Highlight the Need For Palliative Care Services For Seriously Ill Prisoners in Correctional Facilities and in Community Hospitals: a Cross-Sectional Study*, 32 *J. Palliative Med.* 17-22 (2018), available at <https://journals.sagepub.com/doi/pdf/10.1177/0269216317731547>.

<sup>19</sup> *Id.* at 20.

<sup>20</sup> Hannah Summers, ‘*Everyone Will Be Contaminated*’: *Prisons Face Strict Coronavirus Controls*, *The Guardian* (Mar. 23, 2020), <https://www.theguardian.com/global-development/2020/mar/23/everyone-will-be-contaminated-prisons-face-strict-coronavirus-controls>.

<sup>21</sup> Ellis, *Covid-19 Poses a Heightened Threat in Jails and Prisons*.

<sup>22</sup> Ryan Lucas, *As COVID-19 Spreads, Calls Grow to Protect Inmates in Federal Prisons*, *NPR* (Mar. 24, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/03/24/820618140/as-covid-19-spreads-calls-grow-to-protect-inmates-in-federal-prisons>.

sick inmates, other than the facilities' Special Housing Unit (SHU).<sup>23</sup> While the cells in the SHU have solid doors to minimize the threat of viral spread in otherwise overcrowded facilities, they rarely have intercoms or other ways for sick inmates to contact officers in an emergency.<sup>24</sup> This is particularly dangerous for those with COVID-19 infection since many patients with COVID-19 descend suddenly and rapidly into respiratory distress.<sup>25</sup>

18. Even those facilities that do have healthcare centers can only treat relatively mild types of respiratory problems for a very limited number of people.<sup>26</sup> This means that people who become seriously ill while in prisons and jails will be transferred to community hospitals for care. At present, access to palliative care in prison is also limited.

19. Corrections officers may also be particularly vulnerable to coronavirus due to documented high rates of diabetes and heart disease.<sup>27</sup> Prison staff in Pennsylvania, Michigan, New York and Washington state have tested positive for the virus, resulting in inmate quarantines. In Washington, D.C., a U.S. marshal who works in proximity to new arrestees tested positive for the virus, meaning dozens of defendants headed for jail could have been exposed.<sup>28</sup> In New York,

---

<sup>23</sup> MCC New York COVID 19 Policy Memo, Mar. 19, 2020, <https://www.documentcloud.org/documents/6818073-MCC-New-York-COVID-19-Policy-Memo.html>; Danielle Ivory, *'We Are Not a Hospital': A Prison Braces for the Coronavirus*, N.Y. Times (Mar. 17, 2020), <https://www.nytimes.com/2020/03/17/us/coronavirus-prisons-jails.html>.

<sup>24</sup> Brie Williams *et al.*, *Correctional Facilities in the Shadow of COVID-19: Unique Challenges and Proposed Solutions*, Health Affairs (Mar. 26, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200324.784502/full/>.

<sup>25</sup> Lizzie Presser, *A Medical Worker Describes Terrifying Lung Failure From COVID-19—Even in His Young Patients*, ProPublica (Mar. 21, 2020), <https://www.propublica.org/article/a-medical-worker-describes--terrifying-lung-failure-from-covid19-even-in-his-young-patients>.

<sup>26</sup> Ellis, *Covid-19 Poses a Heightened Threat in Jails and Prisons*; Li and Lewis, *This Chart Shows Why the Prison Population is So Vulnerable to COVID-19*.

<sup>27</sup> Brie Williams, *Role of US-Norway Exchange in Placing Health and Well-Being at the Center of US Prison Reform*, <https://ajph.aphapublications.org/doi/10.2105/AJPH.2019.305444> (published Jan. 22, 2020).

<sup>28</sup> Zusha Elinson and Deanna Paul, *Jails Release Prisoners, Fearing Coronavirus Outbreak*, WSJ (Mar. 22, 2020), <https://www.wsj.com/articles/jails-release-prisoners-fearing-coronavirus-outbreak-11584885600> (“We’re all headed for some dire consequences,” said Daniel Vasquez, a former warden of San Quentin and Soledad state prisons in

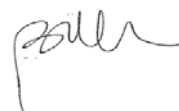
236 members of the New York Police Department have tested positive for coronavirus and 3,200 employees are sick, triple the normal sick rate.<sup>29</sup> Two federal prison staffers have also tested positive.<sup>30</sup>

20. For this reason, correctional health is public health. Decreasing risk in prisons and jails decreases risk to our communities.

21. Reducing the overall population within correctional facilities will also help medical professionals spread their clinical care services throughout the remaining population more efficiently. With a smaller population to manage and care for, healthcare and correctional leadership will be better able to institute shelter in place and quarantine protocols for those who remain. This will serve to protect the health of both inmates as well as correctional and healthcare staff.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: San Francisco, California  
March 27, 2020



---

Dr. Brie Williams

---

California. “They’re in such close quarters—some double- and triple-celled—I think it’s going to be impossible to stop it from spreading.”).

<sup>29</sup> Erin Durkin, *Thousands of NYPD Officers Out Sick Amid Coronavirus Crisis*, Politico (Mar. 25, 2020), <https://www.politico.com/states/new-york/albany/story/2020/03/25/thousands-of-nypd-officers-out-sick-amid-coronavirus-crisis-1268960>.

<sup>30</sup> Elinson and Paul, *Jails Release Prisoners, Fearing Coronavirus Outbreak*.