

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
SOUTHERN DIVISION**

**UNITED STATES OF AMERICA**

v.

**KEVIN A. JOHNSON**

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**17-po-9262**

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**EMERGENCY MOTION FOR AMENDED JUDGMENT**

The Defendant, Kevin A. Johnson, by and through his attorneys, James Wyda, Federal Public Defender for the District of Maryland, and Stephanie Snyder, Assistant Federal Public Defender, respectfully moves this Honorable Court, to amend and modify the sentence imposed in this case. In support of this motion, counsel states as follows:

1. On December 4, 2019, Mr. Johnson came before the Court for a hearing on a misdemeanor violation of probation. The Court had previously placed him on concurrent 24-month terms of probation with a variety of special conditions upon his guilty pleas to two class-B misdemeanor offenses: driving under the influence of alcohol and possessing a weapon in a park. *See* ECF No. 21, Judgment and Commitment Order dated April 18, 2018.
2. At the violation hearing, the Court accepted Mr. Johnson's no contest plea to an allegation that he was in violation of the terms and conditions of his probation by failing to make regular payments towards the fine and special assessment ordered by the Court at the time of his sentencing, as well as Mr. Johnson's admission that he was unsuccessfully discharged

from a substance abuse treatment program. The Court subsequently revoked Mr. Johnson's probation and ordered him to serve five months in the custody of the Bureau of Prisons (BOP) to begin immediately. *See* ECF 47, Judgment and Commitment Order dated December 9, 2019.

3. According to BOP online records, Mr. Johnson will finish his sentence on April 30, 2020. He has already served two-thirds of the sentence imposed, and he is within 45 days of his scheduled release.
4. Upon information and belief, Mr. Johnson began serving his sentence at the D.C. Jail and was subsequently moved to the Correctional Treatment Facility, another contact facility operated by the District of Columbia Department of Corrections.
5. As the Court is well aware, the nation is in the midst of responding to an unprecedented national health emergency due to COVID-19, a dangerous illness that is spreading rapidly throughout the world and, of particular salience to the instant motion, throughout Maryland and the District of Columbia. As of March 17, 2020, the new strain of coronavirus which causes COVID-19, has infected over 182,100 people, leading to at least 7305 deaths worldwide.<sup>1</sup> On March 11, 2020, the World Health Organization officially classified COVID-19 as a pandemic.<sup>2</sup> President Trump declared a national emergency due to COVID-

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

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

19 on March 13, 2020.<sup>3</sup> Well prior to the national declaration, Maryland Governor Larry Hogan declared a State of Emergency in Maryland due to COVID-19 on March 5, 2020.<sup>4</sup> As of the morning of March 17, 2020, there were forty-one confirmed cases of COVID-19 in the state of Maryland, fifty-two in Virginia, and twenty-three in Washington, DC for a regional total of 116 confirmed cases.<sup>5</sup>

6. Courts throughout the nation, including this one, have dramatically scaled back their operations. The Supreme Court has canceled oral argument—for the first time in 102 years—for the remainder of the month.<sup>6</sup> Federal courts in Maryland, Virginia, and the District of Columbia are open for emergencies only.<sup>7</sup> State courts in Maryland, the District of Columbia, and Virginia are all also operating on an emergency basis and are essentially

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<sup>3</sup> *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, Donald Trump, March 13, 2020, available at <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>

<sup>4</sup> *Declaration of State of Emergency and Existence of Catastrophic Health Emergency-COVID-19*, by Governor Hogan, March 5, 2020, available at <https://governor.maryland.gov/wp-content/uploads/2020/03/Proclamation-COVID-19.pdf>

<sup>5</sup> *D.C., Md., restaurants and bars ordered shut down as regions cases exceed 100*, Washington Post, March 17, 2020, available at <https://www.washingtonpost.com/dc-md-va/2020/03/17/coronavirus-dc-maryland-virginia-updates/> (continuously updating).

<sup>6</sup> U.S. Supreme Court Press Release, March 16, 2020, available at [https://www.supremecourt.gov/publicinfo/press/pressreleases/pr\\_03-16-20](https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_03-16-20).

<sup>7</sup> See various Standing Orders filed in *In re COVID-19 Pandemic Procedures*, Misc. No. 20-146, United States District Court for the District of Maryland; *In re Court Operations in Exigent Circumstances Created by the COVID-19 Pandemic*, Standing Order 20-9, United States District Court for the District of Columbia; *In re: Court Operations under the Exigent Circumstances Created by the Outbreak of Coronavirus Disease 2019 (COVID-19): Temporary Continuance of Court Proceedings and Restrictions on Visitors to Courthouses*, General Order No. 2020-03, United States District Court for the Eastern District of Virginia.

closed to the general public.<sup>8</sup> Schools are shut throughout the region.<sup>9</sup> The governor of Maryland, acting in a similar vein to officials in California, Colorado, Connecticut, Illinois, Indiana, Kentucky, Massachusetts, Michigan, Minnesota, New Jersey, New York, New Hampshire, Ohio, Oregon, Pennsylvania, Puerto Rico, Rhode Island, Vermont, and Washington has ordered that all restaurants and bars be shut down indefinitely.<sup>10</sup> Elections have been delayed, including the Maryland presidential primary scheduled for April 28, 2020.<sup>11</sup> The CDC recommends that any gathering of more than 50 people be cancelled or postponed for at least eight weeks, and the President of the United States urged Americans to avoid gathering in groups of more than ten people for the next 15 days.<sup>12</sup> Jails throughout

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<sup>8</sup> See generally Maryland Judiciary Coronavirus (COVID-19) Updates, available at <https://mdcourts.gov/coronavirusupdate>; DC Courts' Coronavirus Advisories, available at <https://www.dccourts.gov/coronavirus>; In re: Order Declaring a Judicial Emergency in Response to COVID-19 Emergency, Supreme Court of Virginia, March 16, 2020, available at [http://www.courts.state.va.us/2020\\_0316\\_scv\\_order\\_declaration\\_of\\_judicial\\_emergency.pdf](http://www.courts.state.va.us/2020_0316_scv_order_declaration_of_judicial_emergency.pdf)

<sup>9</sup> See, e.g., *State Superintendent Salmon Announces Temporary Closure of Maryland Public Schools*, March 12, 2020, available at <https://news.maryland.gov/msde/state-superintendent-salmon-announces-temporary-closure-of-maryland-public-schools/>

<sup>10</sup> See *Order of the Governor of the State of Maryland Amending and Restating The Order of March 12, 2020, Prohibiting Large Gatherings and Events and Closing Senior Centers, and Additionally Closing Bars, Restaurants, Fitness Centers, and Theaters*, Governor Hogan, March 16, 2020, available at <https://www.courts.state.md.us/sites/default/files/import/coronavirus/eo20200316restatingorderofmarch12gatherings.pdf>. See also “*The States and Cities Banning In-Person Dining at Restaurants and Bars During the Coronavirus Outbreak*”, Fox News, March 16, 2020, available at <https://www.foxnews.com/food-drink/states-closing-bars-restaurants-coronavirus-outbreak>.

<sup>11</sup> “*Ohio Governor Announces Polls will be Closed Tuesday Over Coronavirus*”, Dan Merica, CNN, March 17, 2020, available at <https://www.cnn.com/2020/03/16/politics/ohio-primary/index.html>; “*Maryland Postpones Primary, Shifts Special Election to Mail Voting Over Coronavirus*”, Alice Miranda Ollstein and Zach Montellaro, Politico, March 17, 2020, available at <https://www.politico.com/news/2020/03/17/maryland-postpones-april-28-primary-election-over-coronavirus-133776..>

<sup>12</sup> See, “*CDC Recommends Against Gatherings of Fifty or More; States Close Bars and Restaurants*”, Emma Bowman, NPR, March 15, 2020, available at <https://www.npr.org/2020/03/15/816245252/cdc-recommends-suspending-gatherings-of-50-or-more-people-for-the-next-8-weeks>; “*The President’s Coronavirus Guidelines for America, 15 Days to Slow the Spread*”, announced March 16, 2020 and available at

Maryland have suspended visitation.<sup>13</sup> Legal visits and social visits are suspended in all Bureau of Prisons facilities.<sup>14</sup>

7. Conditions of confinement create the ideal environment for the transmission of contagious disease.<sup>15</sup> Inmates cycle in and out of detention facilities from all over the country, and people who work in the facilities including correctional officers and care and service providers leave and return daily, without screening. Incarcerated people have poorer health than the general population and, even at the best of times, medical care is limited in these facilities.<sup>16</sup> Many people who are incarcerated also have chronic conditions, like diabetes or HIV, which makes them vulnerable to severe forms of COVID-19. According to public health experts, incarcerated individuals “are at special risk of infection, given their living situations,” and “may also be less able to participate in proactive measures to keep themselves safe;” “infection control is challenging in these settings.”<sup>17</sup> Outbreaks of the flu

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[https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20\\_coronavirus-guidance\\_8.5x11\\_315PM.pdf](https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf)

<sup>13</sup> “MD State Prison Visits Suspended Immediately”, Press Release, March 12, 2020 from Maryland Department of Public Safety and Correctional Services, available at <https://news.maryland.gov/dpscs/wp-content/uploads/sites/4/2020/03/VISITS-CANCELLED-31220.pdf>

<sup>14</sup> “Federal Bureau of Prisons COVID-19 Action Plan”, March 13, 2020, available at [https://www.bop.gov/resources/news/20200313\\_covid-19.jsp](https://www.bop.gov/resources/news/20200313_covid-19.jsp).

<sup>15</sup> Joseph A. Bick (2007). Infection Control in Jails and Prisons. *Clinical Infectious Diseases* 45(8):1047-1055, at <https://doi.org/10.1086/521910>.

<sup>16</sup> Laura M. Maruschak et al. (2015). Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-12. NCJ 248491. Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, at <https://www.bjs.gov/content/pub/pdf/mpsfjji1112.pdf>

<sup>17</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,” (March 2, 2020), at <https://bit.ly/2W9V6oS>; “An Epicenter of the Pandemic will be Jails and Prisons, if Inaction Continues”, Amanda Klonsky, *New York Times*, March 16, 2020; “How Prisons and Jails Can Respond to the Coronavirus”, Jennifer Gonnerman, the *New Yorker*, March 14, 2020.

regularly occur in jails, and during the H1N1 epidemic in 2009, many jails and prisons dealt with high numbers of cases.<sup>18</sup> In China, officials have confirmed the coronavirus spreading at a rapid pace in Chinese prisons, counting 500 cases.<sup>19</sup> Secretary of State Mike Pompeo has called for Iran to release Americans detained there because of the “deeply troubling” “[r]eports that COVID-19 has spread to Iranian prisons,” noting that “[t]heir detention amid increasingly deteriorating conditions defies basic human decency.”<sup>20</sup> Courts across Iran have granted 54,000 inmates furlough as part of the measures to contain coronavirus across the country.<sup>21</sup> In the U.S. steps are already being taken in some jurisdictions to facilitate the release of elderly and sick prisoners and to reduce jail populations by providing early release for some inmates and by discouraging the admission of individuals arrested on non-violent misdemeanor charges.<sup>22</sup>

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<sup>18</sup> *Prisons and Jails are Vulnerable to COVID-19 Outbreaks*, The Verge (Mar. 7, 2020) at <https://bit.ly/2TNcNZY>.

<sup>19</sup> Rhea Mahbubani, *Chinese Jails Have Become Hotbeds of Coronavirus As More Than 500 Cases Have Erupted, Prompting the Ouster of Several Officials*, Business Insider (Feb. 21, 2020) at <https://bit.ly/2vSzSRT>.

<sup>20</sup> Jennifer Hansler and Kylie Atwood, *Pompeo calls for humanitarian release of wrongfully detained Americans in Iran amid coronavirus outbreak*, CNN (Mar. 10, 2020) at <https://cnn.it/2W4OpV7>.

<sup>21</sup> Claudia Lauer and Colleen Long, *US Prisons, Jails On Alert for Spread of Coronavirus*, The Associated Press (Mar. 7, 2020) at <https://apnews.com/af98b0a38aaabedbc059092db356697>.

<sup>22</sup> In New York Brooklyn District Attorney Eric Gonzalez, joined by public health experts, has asked Governor Cuomo to grant emergency clemencies to elderly and sick prisoners (Sarah Lustbader, *Coronavirus: Sentenced to COVID-19*, The Daily Appeal (Mar. 12, 2020) at <https://theappeal.org/sentenced-to-covid-19/>); Cuyahoga County (Ohio) is holding mass pleas and bail hearings to reduce the current jail population (<https://www.cleveland.com/court-justice/2020/03/cuyahoga-county-officials-will-hold-mass-plea-hearings-to-reduce-jail-population-over-coronavirus-concerns.html>); Mahoning County (Ohio) jail is refusing all non-violent misdemeanor arrestees (<https://www.wkbn.com/news/coronavirus/mahoning-county-jail-refusing-some-inmates-due-to-coronavirus-outbreak/>); see also Collin County (TX) (<https://www.dallasnews.com/news/public-health/2020/03/12/facing-coronavirus-concerns-collin-county-sheriff-asks-police-not-to-bring-petty-criminals-to-jail/>). See also “*Ohio Jail Releases Hundreds of Inmates Due to Coronavirus Concerns*”, <https://kfor.com/health/coronavirus/ohio-jail-releases-hundreds-of-inmates-due-to-coronavirus-concerns/>; “*Los*

8. The federal bench in the District of Maryland is well aware of many of the challenging conditions of confinement that individuals confront in the local federally-contracted facilities that are relied upon by the court for defendants awaiting trial and serving short sentences. These harsh conditions have also not infrequently been the basis for Maryland district court judges to provide downward variances when sentencing individuals in this jurisdiction. *See, e.g., United States v. Amin Laguna Morales*, No. TDC-19-cr-180 (finding it appropriate to grant a downward variance due in part to the poor conditions of pretrial confinement at CDF and the D.C. Jail).
9. It is unrealistic to expect that, in a time of national emergency and in the face of a pandemic, these same facilities would have the resources necessary to engage in screening and testing of inmates, correctional staff, law enforcement officers and other care and service providers who enter the facility. Moreover, each new arrestee brought from the community into local federal custody facilities will be held with the existing population, potentially bringing COVID-19 into the jail population. The large number of inmates, close quarters, and low sanitary conditions create an especially alarming breeding ground for new COVID-19 cases.
10. The courts have long recognized that there is no greater necessity than keeping a defendant alive, no matter the charge. As Judge Weinstein held, “We do not punish those who have not been proven guilty. When we do punish, we do not act cruelly. Continued incarceration of this terminally ill defendant threatens both of these fundamental characteristics of our

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*Angeles is Releasing Inmates Early and Arresting Fewer People Over Fear of the Coronavirus in Jails*” <https://www.buzzfeednews.com/article/salvadorhernandez/los-angeles-coronavirus-inmates-early-release>; “*Sheriff suspends non-violent arrests due to COVID-19*” Alyssa Mauk, March 14, 2020, *The Journal Times*.

democracy.” *United States v. Scarpa*, 815 F.Supp.88 (E.D.N.Y. 1993) (pretrial defendant with AIDS facing murder charges released on bail because of the “unacceptably high risk of infection and death on a daily basis inside the MCC”).

11. This Court should consider the “total harm and benefits to prisoner and society” that continued imprisonment will yield, relative to the heightened health risks posed during this rapidly encroaching pandemic. *See Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring) (calling for heightened judicial scrutiny of the projected impact of jail and prison conditions on a defendant); *United States v. Mateo*, 299 F. Supp. 2d 201, 212 (S.D.N.Y. 2004) (reducing sentence where defendant’s pretrial conditions were “qualitatively more severe in kind and degree than the prospect of such experiences reasonably foreseeable in the ordinary case”). The risk to the jail population, the staff of the correctional facilities, and the community at large is lessened when fewer inmates are detained. People who are incarcerated for relatively low-level offenses and who pose no threat to the community’s safety simply should not be in jails at this moment of national crisis.
12. The situation facing the Court and Mr. Johnson has dramatically changed since the time of his sentencing and calls for a proportionate response from the Court. There are circumstances where the importance of the finality of a given judgment in a misdemeanor probation violation case must give way to larger and more fundamental concerns about what justice requires.<sup>23</sup> This is one of those times.

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<sup>23</sup> *But see United States v. Goodwyn*, 596 F.3d 233 (4th Cir. 2010).



13. This is particularly the case because, while the District of Columbia City Council is in the process of adopting emergency legislation that would allow for changes in computing good-time credits for misdemeanants in the correctional facilities where Mr. Johnson is housed,<sup>24</sup> he cannot benefit from those changes because he is serving a federal sentence. Similarly, any efforts the BOP might otherwise engage in to expedite the release of low-risk individuals (such as those with less than 45 days remaining to serve on a non-violent offense), will likely not be of benefit to Mr. Johnson who is neither housed in a BOP facility nor eligible for good time credits, home confinement, or release to a halfway house under existing BOP regulations because he is serving a misdemeanor sentence as opposed to a felony one.
14. Counsel respectfully submits that the unique circumstances of this situation, when considered in conjunction with the overriding principle of 18 U.S.C. §3553(a) that a sentence be sufficient, but not greater than necessary, to achieve the goals of sentencing, compel the court to amend the judgment and commitment order to reflect a sentence of time-served at this juncture in the interests of justice. Alternatively, the Court should order Mr. Johnson's immediate release with the understanding that he be required to self-surrender to serve the balance of his sentence at a later date.
15. Should the Court disagree, Mr. Johnson respectfully requests that the Court convene an emergency hearing on the matter forthwith.

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<sup>24</sup> See, e.g. Section 313 of COVID-19 Response Emergency Amendment Act of 2020-March 16<sup>th</sup> Draft, available at <http://chairmanmendelson.com/wp-content/uploads/2020/03/3.16.20-COVID-Response-Act-Summary.pdf>.

WHEREFORE, Mr. Johnson requests that the Court amend the judgment and commitment order in this case to reflect a sentence of time served, or for any other relief that the Court deems just and proper given the extraordinary circumstances of this case and this time.

Respectfully submitted,

JAMES WYDA

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/s/

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