

ORIGINAL

No. _____

IN THE
Supreme Court of Appeals of West Virginia

DONALD MILLER, *et al.*,

Petitioners,

v.

BETSY JIVIDEN, in her official capacity as Commissioner of the West Virginia Division of Corrections and Rehabilitation, JEFF SANDY, in his official capacity as Cabinet Secretary of West Virginia Department of Military Affairs and Public Safety, and RALPH MILLER, in his official capacity as Acting Chairperson of the West Virginia Parole Board,

Respondents.

PETITION FOR WRIT OF HABEAS CORPUS

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I. QUESTION PRESENTED

Whether, in light of an unprecedented global health pandemic that disproportionately threatens vulnerable individuals in densely populated environments, Petitioners, as listed in five specified categories, qualify for immediate release when Petitioners are nonviolent offenders who present a minimal safety risk to the public at most, many of whom are medically vulnerable, and when recently passed legislation not yet in effect but under which Petitioners would be eligible for immediate release should now be released immediately from regional jails and prisons, in light of the ongoing global pandemic resulting from the rapid spread of COVID-19, which poses an extremely high risk to facilities such as prisons and jails where it is impossible for Petitioners, as well as those similarly situated, to adhere to guidelines promulgated by the Center for Disease Control and guidelines recommended by public health officials and other medical experts, both of which are critically necessary to protect the health of Petitioners, the health of staff, and the health of others in the greater statewide community.

II. BACKGROUND AND STATEMENT OF THE CASE

A. Introduction

West Virginia's correctional facilities and regional jails suffer from severe overcrowding. At the time of this writing, there are hundreds more incarcerated individuals than beds available for them. COVID-19—a novel coronavirus that causes severe respiratory issues and may be fatal for medically vulnerable and older individuals—is spreading swiftly and without mercy across the world, with outbreaks occurring most often in densely populated facilities, such as nursing homes, cruise ships, and jails. Petitioners are individuals incarcerated in West Virginia's prisons and regional jails who pose a minimal risk to public safety, and many of whom would qualify for release under recently-enacted legislation that will be effective in mere weeks, and others under an expansive definition of compassionate release. For these individuals, the timing of their release

may be, literally, a matter of life and death. They bring this Petition seeking the extraordinary relief of immediate release. Alternatively, Petitioners that are determined to candidates best suited for reduced bond request their cases be remanded to Circuit Court for an immediate hearing requiring the presiding judge to provide articulated reasons if bond is not lowered or if early release is not granted.

B. The Ongoing Global Pandemic Caused by the Novel Coronavirus or “COVID-19”

The novel coronavirus, which first emerged in late December, causes a virus known as COVID-19, which is spreading exponentially across the world, the country, and across West Virginia. The World Health Organization has declared COVID-19 a pandemic.¹ There is no known vaccine, and no uninfected person is immune. While it was initially believed that COVID-19 has disproportionately high rates of infection among older or otherwise vulnerable adults, such as those with preexisting conditions and comorbidities, it has since been determined that the virus impacts all age groups. Indeed, the virus can have devastating impacts, and can be fatal, even in the youngest infected patients. The virus is difficult to treat or prepare for, as it varies in degree with each infected person, with no identifiable commonalities among particular groups and no specific individual developing consistent or predictable responses to the disease.

The number of individuals testing positive for COVID-19 spikes dramatically on a daily basis. Moreover, the virus has not reached what is known as its apex, or peak in any geographical area within the United States, meaning that one certain timespan, lasting for an unknown length of days or weeks, will account for the highest number of infections to date. As of April 7, 2020, more than 1,317,000 people worldwide have been diagnosed with COVID-19 and more than 74,000 of those people have died.² These numbers are up approximately 566,000 and 36,000, respectively,

¹ Betsy McKay et al., Coronavirus Declared Pandemic by World Health Organization, Wall St. J. (Mar. 11, 2020, 11:59 PM), <https://www.wsj.com/articles/u-s-coronavirus-cases-top-1-000-11583917794>.

² World Health Organization, Coronavirus Disease (COVID-19), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019> (last visited Apr. 7, 2020).

from the 750,890 confirmed cases and 37,405 deaths reported just eight days prior on March 31, 2020.³

As of the date of this filing, there are 412 confirmed cases of coronavirus (four resulting in death) in West Virginia, up from 162 confirmed cases and one death eight days prior on March 31, 2020.⁴ One week prior to March 31, 2020, on March 24, 2020, only 39 people had tested positive in West Virginia for COVID-19.⁵ One cluster in Kanawha County is associated with the Kanawha County Judicial Annex, where many Petitioners, or those similarly situated, come into direct contact with now-infected individuals.

C. Vulnerable Populations

Older adults and those with certain medical conditions face greater chances of serious illness or death from COVID-19.⁶ Certain underlying medical conditions increase the risk of serious COVID-19 disease for people of any age—including lung disease, heart disease, chronic liver or kidney disease (including hepatitis and dialysis patients), diabetes, epilepsy, hypertension, compromised immune systems (such as from cancer, HIV, or autoimmune disease), blood disorders (including sickle cell disease), inherited metabolic disorders, stroke, developmental delay, and pregnancy.

For people over the age of 50 or with medical conditions that increase the risk of serious COVID-19 infection, symptoms such as fever, coughing and shortness of breath can be especially severe. The West Virginia Division of Corrections and Rehabilitation in its 2018

³ See *id.*, compare to Coronavirus disease 2019 (COVID-19) Situation Report – 71, World Health Organization, https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200331-sitrep-71-covid-19.pdf?sfvrsn=4360e92b_8.

⁴ West Virginia Department of Health and Human Resources, March/April 2020 News and Announcements, <https://dhhr.wv.gov/News/2020/Pages/default.aspx> (last visited Apr. 8, 2020).

⁵ *Id.*

⁶ Medical information in this and the petition paragraphs that follow—with the exception of data drawn from the report referenced in the following footnote—are drawn from the expert testimony of two medical professionals filed in a recent filed federal case in Washington State, as well the website of the Harvard Medical School. See Expert Declaration of Dr. Marc Stern, App. At 1-3; Expert Declaration of Dr. Robert Greifinger: App. 4-6; Expert Declaration of Dr. Jonathan Golob, App. 7-10; HARVARD MEDICAL SCHOOL, CORONAVIRUS RESOURCE CENTER, *As coronavirus spreads, many questions and some answers*, <https://www.health.harvard.edu/diseases-and-conditions/coronavirus-resource-center>, (last visited Mar. 19, 2020).

annual report reported that as of June 30, 2017, more than twenty percent of the population incarcerated in West Virginia's jails and prisons were individuals 50 years old or older.⁷

COVID-19 can cause severe damage to lung tissue, sometimes leading to a permanent loss of respiratory capacity, and can damage tissues in other vital organs including the heart and liver. Patients with serious cases of COVID-19 require advanced medical support, including positive pressure ventilation and extracorporeal mechanical oxygenation in intensive care. Patients who do not die from serious cases of COVID-19 may face prolonged recovery periods, including extensive rehabilitation from neurological damage and loss of respiratory capacity.

COVID-19 may also target the heart muscle, causing a medical condition known as myocarditis, or inflammation of the heart muscle. Myocarditis can affect the heart muscle and electrical system, reducing the heart's ability to pump. This reduction can lead to rapid or abnormal heart rhythms in the short term, and long-term heart failure that limits exercise tolerance and ability to work.

Emerging evidence suggests that COVID-19 can also trigger an over-response of the immune system, further damaging tissues in a cytokine release syndrome that can result in widespread damage to other organs, including permanent injury to the kidneys and neurologic injury. These complications can manifest at an alarming pace. Patients can show the first symptoms of infection in as little as two days after exposure, and their condition can seriously deteriorate in as little as five days or sooner.

Most people in higher risk categories who develop serious disease will need advanced supportive care requiring highly specialized equipment that is in limited supply, and an entire team of care providers, including 1:1 or 1:2 nurse to patient ratios, respiratory therapists, and intensive care physicians. This level of support can quickly exceed local health care resources. Patients in high-risk categories should expect a prolonged recovery, including the need for

⁷ See W. Va. Div. of Corrections and Rehabilitation, 2018 Annual Report, App. 11-72, at 51.

extensive rehabilitation for profound reconditioning, loss of digits, neurologic damage, and the loss of respiratory capacity.

The need for care, including intensive care, and the likelihood of death, is much higher from COVID-19 than from influenza. According to recent estimates, the fatality rate of people infected with COVID-19 is about ten times higher than a severe seasonal influenza, even in advanced countries with highly effective health care systems. According to preliminary data from China, 20 percent of people in high-risk categories who contracted COVID-19 there died.⁸

There is no cure for COVID-19 nor is there any known medication to prevent or treat infection. The only known methods to reduce the risk for vulnerable people of serious illness or death from COVID-19 are to prevent infection in the first place through social distancing and improved hygiene, including washing hands frequently with soap and water.

D. The Risk of COVID-19 Outbreaks in West Virginia Jails and Prisons

The risk of infection in jails and prisons is extraordinary,⁹ and incarcerated people have a limited ability to fight the spread of any infectious disease because they cannot control the people with whom they have contact. Additionally, they may not be able to utilize all recommended preventive health measures, including social distancing. Many Petitioners are scared—

⁸ *Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)*, World Health Organization (Feb. 28, 2020), at 12, <https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf> (finding fatality rates for patients with COVID-19 and co-morbid conditions to be: “13.2% for those with cardiovascular disease, 9.2% for diabetes, 8.4% for hypertension, 8.0% for chronic respiratory disease, and 7.6% for cancer”); Wei-jie Guan et al., *Comorbidity and its impact on 1,590 patients with COVID-19 in China: A Nationwide Analysis*, medRxiv (Feb. 27, 2020), at 5, <https://www.medrxiv.org/content/10.1101/2020.02.25.20027664v1.full.pdf> (finding that even after adjusting for age and smoking status, patients with COVID-19 and comorbidities of chronic obstructive pulmonary disease, diabetes, hypertension, and malignancy were 1.79 times more likely to be admitted to an ICU, require invasive ventilation, or die, the number for two comorbidities was 2.59); Fei Zhou et al., *Clinical course and risk factors for mortality of adult inpatients with COVID-19 in Wuhan, China: a retrospective cohort study*, *Lancet* (March 11, 2020), tb. 1, [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30566-3/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30566-3/fulltext) (finding that among hospital patients, who tended to be older, of those who had COVID-19 and died, 48% had hypertension, 31% had diabetes, and 24% had coronary heart disease).

⁹ Alice Su, Emily Baumbaertner, Los Angeles Times, *They Were Already in China's Prisons. Now the Coronavirus is There, Too*, (Feb. 28, 2020) <https://www.latimes.com/world-nation/story/2020-02-28/lawyers-activists-pastors-uighurs-families-of-detainees-in-china-fear-coronavirus-spread-outbreak-in-camps-and-prisons>. (describing how in China, a country with a significantly lower rate of incarceration than the United States, officials reported that over 500 COVID-19 cases stemmed from prisons in Hubei Province, where the virus originated).

the calls received on a daily basis by the undersigned are very concerning. Petitioners are all serving far less than a life sentence, yet the fear expressed, and the bleak awareness of the substantial risk as conveyed by those only jailed for a short term is deeply troublesome. To hear the words “I don’t want to die” over the phone from a once-strong but now shaky voice is a devastating moment of awakening that channels a sudden realization of the looming risk faced by those in custody throughout this pandemic.

In another instance, a second phone call in which “I don’t want to die” was again mentioned, it was the first sentence uttered after a detailed account of one facility’s ban on the use of makeshift facial protective masks crafted by inmates using any available form of covering. Within a matter of minutes, the inmates housed at that facility were deprived of the same protections other Americans and West Virginians are explicitly instructed to take if we want to survive. This demonstrates that the continued confinement of this particular Petitioner and many others throughout this dangerous pandemic would essentially result in what would feel like a life sentence without mercy, but what would really be a death sentence without mercy.

For those like many Petitioners who are soon-to-be released, this is an unimaginable fear. It is perhaps only worse for one other group of Petitioners, who, despite freedom dangling within their reach, remain incarcerated because they simply cannot afford to buy their freedom even at what many would consider a “low” cost. But many Petitioners have an exorbitant price tag attached to their liberty—an amount they will never be able to finance—one that even those in more affluent echelons would struggle to pay.

The Center for Disease Control has recommended that incarcerated individuals practice “social distancing”—maintaining six feet between all individuals, including those that are asymptomatic—to prevent community spread of the virus.¹⁰ Social distancing measures are required for a period of as-yet-undetermined duration, and the COVID-19 outbreak may have

¹⁰ *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, Center for Disease Control 1, 4 (Mar. 23, 2020) , <https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf> (“Although social distancing is challenging to practice in correctional and detention environments, it is a cornerstone of reducing transmission of respiratory diseases such as COVID-19.”).

significant effects on West Virginia's criminal justice systems as long as these measures are in place.

Although jails and correctional facilities can take steps to mitigate the enormous risk, they simply cannot eliminate it.¹¹ Severe outbreaks of contagious illness regularly occur in jails. For example, during the H1N1 epidemic in 2009, many jails and prisons saw a particularly high number of cases.¹² H1N1 is far less contagious than COVID-19. Not surprisingly, Chinese prison officials report that over five-hundred (500) COVID-19 cases in the current outbreak stemmed from the Hubei province prisons.¹³ The rate of incarceration in China is far lower than in the United States, suggesting the problem here will be much worse. Experts predict that “[a]ll prisons and jails should anticipate that the coronavirus will enter their facility[.]”¹⁴

Jail and prison design, operations, and overcrowding issues make it impossible for those incarcerated to engage in the necessary social distancing required to mitigate the risk of transmission. Many people live in dormitory-like sleeping arrangements. They have limited freedom of movement and no control over the movements of others with whom they are required to congregate on a daily basis. They are unable to maintain anything close to the recommended distance of 6 feet from others. Petitioners also cannot maintain adequate levels of preventive hygiene. They are frequently required to share or touch objects used by others. Toilets, sinks and showers are shared, without disinfection between each use. Food preparation and service is

¹¹ See, e.g. Nathalie Baptiste, Mother Jones, *Correctional Facilities Are the Perfect Incubators for the Coronavirus* (Mar. 6, 2020), <https://www.motherjones.com/politics/2020/03/correctional-facilities-are-the-perfect-incubators-for-the-coronavirus/>.

¹² Nicole Westman, The Verge, *Prisons and jails are vulnerable to COVID-19 outbreaks*, available at <https://www.theverge.com/2020/3/7/21167807/coronavirus-prison-jail-health-outbreak-covid-19-flu-soap> (Mar. 12 2020). See also David M. Reutter, *Swine Flu Widespread in Prisons and Jails, but Deaths are Few*, Prison Legal News (Feb. 15, 2020) at <https://www.prisonlegalnews.org/news/2010/feb/15/swine-flu-widespread-in-prisons-and-jails-butdeaths-are-few/>.

¹³ Evelyn Cheng and Huileng Tan, *China Says More than 500 Cases of the New Coronavirus Stemmed from Prisons*, CNBC, Feb. 20, 2020, available at <https://www.cnbc.com/2020/02/21/coronavirus-china-says-two-prisons-reported-nearly-250-cases.html>.

¹⁴ *Id.* (quoting Tyler Winkelman, co-director of the Health, Homelessness, and Criminal Justice Lab at the Hennepin Healthcare Research Institute in Minneapolis).

communal in some facilities, with food served by other incarcerated workers drawn from many different housing areas within the facility, and with little opportunity for surface disinfection.

As incarcerated persons, as well as employees at jails and correctional facilities across the country become infected with COVID-19, the ability to stop the spread of the disease in those facilities is nearly impossible, given the reality of significant overcrowding and the inability for neither the incarcerated nor the employees to practice safe social distancing. For example, in New York City, as of March 27, 2020 there were more than 180 reported cases of COVID-19 in the city's jails.¹⁵ This is more than four times the 39 cases reported just six days earlier, on March 23, 2020.¹⁶ compared to only *one* known case as of Friday, March 20, 2020.¹⁷ Even at current rates of infection, the virus's "attack rate" on Rikers Island – that is, the rate at which the population is being infected – is roughly *five times higher* than anywhere else in the United States of America.

Similarly, the number of those incarcerated and confirmed infected by COVID-19 in jails in Cook County, Illinois, jumped from 38 individuals on March 27, 2020¹⁸ to 167 individuals as

¹⁵ Andrew Denney, NY Post, *Number of NYC Inmates with Coronavirus Soars as Jail Population Dwindles* (Mar. 27, 2020), <https://nypost.com/2020/03/27/number-of-nyc-inmates-with-coronavirus-soars-as-jail-population-dwindles/>.

¹⁶ Robin McDowell & Michael Balsamo, *38 Positive for Coronavirus in NYC jails, including Rikers*, Associated Press (Mar. 22, 2020), <https://apnews.com/54dbc9d47f62cf0c0240314310cfe909> ; *see also* Chelsia Rose Marcus, *Coronavirus Prompts Reopening of Shuttered Jail on Rikers Island*, N.Y. Daily News (Mar. 23, 2020), <https://www.nydailynews.com/coronavirus/ny-coronavirus-correction-department-reopen-jail-20200323-dq2bn3hap5g5bkjagjzsmkdxie-story.html>.

¹⁷ Chelsia Rose Marcus, N.Y. Daily News, *Rikers Island Inmate has Contracted Coronavirus: Officials* (Mar. 18, 2020), <https://www.nydailynews.com/coronavirus/ny-coronavirus-rikers-island-inmate-tests-positive-20200318-gf3r7q4cefaxzlqmrmuevzz3y-story.html>.

¹⁸ *See* Detainee COVID-19 Cases at Cook County Jail Surge to 89, 12 Employees Test Positive, WGN (Mar. 28, 2020) <https://wgntv.com/news/detainee-covid-19-cases-at-cook-county-jail-surge-to-89-12-employees-test-positive/>.

of April 1, 2020.¹⁹ During that same time period, the number of employees confirmed infected by COVID-19 in Cook County jails increased from four²⁰ to 34.²¹

E. Overcrowding in West Virginia Correctional Facilities

Overcrowding is an ongoing and pervasive issue in West Virginia's correctional facilities. As of November 2019, there were approximately 7,000 individuals in West Virginia's jails and prisons, almost three times the amount incarcerated in 1995 and a number estimated to be a full 25 percent above capacity.²² Additionally, an increase in the mortality rate among those incarcerated in West Virginia's facilities has resulted from factors including overcrowding, chronic understaffing, and deaths as a result medical issues, suicides, and drug overdoses.²³ Incarcerated individuals have reported having to sleep on cement floors because there are too few beds available and have experienced a lack of access to the most basic necessities to maintain proper hygiene, including toothbrushes, soap, and shampoo.²⁴

Overcrowding continues to be an issue in West Virginia's regional jails, as well as its other correctional facilities, and must be addressed immediately in order to stem as much as possible a COVID-19 outbreak before it occurs, if it has not already, in those facilities. Although laudable steps have been taken by the responsible government agencies to release some

¹⁹ See NBC Chicago, *167 Cook County Jail Detainees Have Tested Positive for COVID-19* (Apr. 1, 2020), <https://www.nbcchicago.com/news/local/167-cook-county-jail-detainees-have-tested-positive-for-covid-19-officials-say/2248892/>.

²⁰ See Detainee COVID-19 Cases at Cook County Jail Surge to 89, 12 Employees Test Positive, WGN (Mar. 28, 2020) <https://wgntv.com/news/detainee-covid-19-cases-at-cook-county-jail-surge-to-89-12-employees-test-positive/>

²¹ See NBC Chicago, *167 Cook County Jail Detainees Have Tested Positive for COVID-19* (Apr. 1, 2020), <https://www.nbcchicago.com/news/local/167-cook-county-jail-detainees-have-tested-positive-for-covid-19-officials-say/2248892/>.

²² Shauna Johnson, MetroNews, *House Judiciary chair: Prison Overcrowding Proposals are Priority for Regular Session*, (Nov. 11, 2019) <http://wvmetronews.com/2019/11/18/house-judiciary-chair-prison-overcrowding-proposals-are-priority-for-regular-session/>.

²³ Gabriella Brown, WV News, *Overcrowding, Understaffing, Inmate Deaths Continue to Plague WV Jails*, https://www.wvnews.com/news/wvnews/overcrowding-understaffing-inmate-deaths-continue-to-plague-wv-jails/article_9a788e06-8f50-5907-bd53-40560a2d5f6f.html ("A lot of my clients have told me they sleep on the floor on cement, some of them don't get blankets, some of them don't have pillows," [defense attorney Zach Dyer] said. "I don't think they have the greatest hygiene. Every once in awhile they will get to shower; sometimes if they get in trouble or written up they get their hygiene taken away from them — so their toothbrushes, shampoo, and soaps.").

²⁴ *Id.*

individuals in light of COVID-19,²⁵ numbers provided by the West Virginia Division of Corrections and Rehabilitation on April 1, 2020 indicate that the population in the state's ten regional jails still far exceeds the capacity of those facilities, with 4,535 individuals incarcerated and a capacity of 4,265.²⁶ At the time of this writing, there are *270 more incarcerated individuals than there are beds available for them* in West Virginia's regional jails alone. (Emphasis added).

The COVID-19 pandemic is not the first statewide disaster where overcrowding has contributed to the endangering the public health of the incarcerated. In 2014, the West Virginia's then-governor declared a state of emergency when 10,000 gallons of chemicals leaked into the Elk River.²⁷ At that time, incarcerated individuals in one overcrowded regional facility reported having access to as little as 16 ounces of clean water per day.²⁸

Despite medical guidelines indicating that adult men should be drinking 100 ounces of water a day, a representative for the West Virginia Department of Military Affairs and Public Safety reportedly confirmed that individuals were given "far less than eight bottles [of] water a day."²⁹ Those in custody at the facility reported problems from "minor rashes to respiratory infections and fainting spells" and described a policy instituted after the disaster "which could land someone in solitary confinement for asking to see a nurse too many times."³⁰

²⁵ Leslie Rubin, Eyewitness News, *W. Va. Taking Steps to Reduce Inmate Population Amid COVID-19 Pandemic* (Apr. 1, 2020), <https://wchstv.com/news/coronavirus/wva-taking-steps-to-reduce-inmate-population-amid-covid-19-pandemic>.

²⁶ Email from Brad T. Douglas, Chief of Staff, West Virginia Division of Corrections and Rehabilitation, to Rose Winland, Operations and Development Manager, American Civil Liberties Union of West Virginia (Apr. 1, 2020, 12:22 p.m. ET), App. at 73.

²⁷ Christie Thompson, Prison Legal News, *The Untold Story of What Happened at an Overcrowded West Virginia Jail After the Chemical Spill* (June 2014), <https://www.prisonlegalnews.org/news/2014/jun/2/untold-story-what-happened-overcrowded-west-virginia-jail-after-chemical-spill/>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

F. Preventing and Stemming a COVID-19 Outbreak in Jails and Prisons

Experts have noted that COVID-19 is capable of spreading rapidly in institutions like nursing homes, cruise ships, and correctional facilities such as jails and prisons because of the difficulty of maintaining proper social distancing.³¹

In fact, the first reported widespread outbreak of COVID-19 in West Virginia occurred in the confines of another populous institutional facility in West Virginia—Sundale Nursing Home in Morgantown.³² As of March 31, 2020, twenty-nine of the state’s 191 confirmed COVID-29 cases are residents or employees of Sundale.³³

Because risk mitigation is the only known strategy to protect vulnerable groups from COVID-19 and risk mitigation is effectively impossible in jails, public health experts have noted the likelihood of the pandemic swiftly spreading in correctional facilities and concluded that vulnerable individuals living in an institutionalized facility, such as a prison or jail, are at “grave risk of severe illness or death from COVID-19.”³⁴

Some correctional facility administrators are in agreement with public health experts on this issue: For example, Dr. Brie Williams, a professor of medicine and an expert on health issues in the criminal legal system, and LeAnn Bertsch, Director of the North Dakota Department of Corrections and Rehabilitation agree that the **only** effective way to protect the

³¹ See, e.g., Declaration of Dr. Jonathan Louis Golob, Application for Extraordinarily Relief Under the Court’s King’s Bench, No. 70 MM 2020 (filed March 30, 2020) (Sup. Ct. Penn.) *available at* https://www.aclupa.org/sites/default/files/field_documents/dr._golob_declaration_march_30_2020_0.pdf.

³² Joe Severino, Charleston Gazette-Mail, *A WV Nursing Home Had 29 COVID-19 Cases. Here’s How They Contained the Initial Spread* (Mar. 31, 2020), https://www.wvgazettemail.com/coronavirus/a-wv-nursing-home-had-29-covid-19-cases-heres-how-they-contained-the-initial/article_bb4394c4-8583-5e77-b62c-aa6943a362ef.html.

³³ *Id.*

³⁴ *Id.*

incarcerated and employees from a COVID-19 outbreak must include decreasing the population density in jails and prisons.³⁵

West Virginia regional jails and prisons lack adequate infrastructure to address the spread of infectious disease and the treatment of people most vulnerable to illness. Although the Division of Corrections and Rehabilitation has taken some steps to address the safety and health of those incarcerated in the state's facilities, it has not provided detailed evidence of the protocols it has implemented to screen, detect or identify incarcerated people or staff who have been infected.³⁶

However, while it appears some steps have been taken, the Department of Military Affairs and Public Safety on Saturday, April 5 issued a public press release highlighting favorably comments from law enforcement, county officials, and other related government

³⁵ Brie Williams, LeAnn Bertsch, The Appeal, *A Public Health Doctor and a Head of Corrections Agree: We Must Immediately Release People From Jails and Prisons* (Mar. 27, 2020), <https://theappeal.org/a-public-health-doctor-and-head-of-corrections-agree-we-must-immediately-release-people-from-jails-and-prisons/>. Bertsch and Williams recommend the following populations be released to lower population density in the interest of public health:

Second, we must reduce the population density inside jails and prisons by evaluating individuals for suitability for accelerated release – focusing on those at high medical risk and/or low public safety risk. This should include any person age 50 or older or within two years of a parole or release date. People over the age of 50 inside a correctional facility are most at risk from this virus but also pose little to no threat of violence upon release. In addition, due to often burdensome administrative hurdles, many incarcerated people with serious or life-limiting illnesses have already begun a compassionate release application process and have developed a housing and medical plan for release. These people should be released. And finally, release should include any person who has already been positively adjudicated in a pardon or parole process and is awaiting release pending administrative processes.

Id.

³⁶ Document provided via email from Stacy Nowicki, Deputy General Counsel, Department of Military Affairs and Public Safety to Loree Stark, Legal Director, American Civil Liberties Union of West Virginia (Mar. 23, 2020, 12:30 p.m. ET) (responding to request under the West Virginia Freedom of Information Act, noting that “guidelines” and “expectations” had been provided to West Virginia’s correctional facilities regarding screening protocol but providing no further detail). App. 74-75.

bodies opposed to any early release of incarcerated individuals in light of COVID-19.³⁷ For example, the statement quoted a representative of the West Virginia Emergency Management Council, speaking generally of early release of the incarcerated: “This action could cause victim anxiety, public distrust and could very well negate the confidence that West Virginians have placed in their state and local governments, making the job of our law enforcement even more burdensome.”³⁸ The statement further quoted a Kanawha County Commissioner as saying “[we] heard loud and clear from the [Kanawha County] Prosecuting Attorney that the effort to allow a mass release of prisoners, including any plan that could potentially allow the release of convicted murderers or sex offenders, raises several legal issues and would prove to be very dangerous to the public.”³⁹

Therefore, despite some actions having been taken by the Department of Military Affairs and Public Safety and the Division of Corrections and Rehabilitation to address COVID-19 concerns, DMAPS’ use of its public platform to promote statements staunchly *against* any significant de-carceration efforts that would be in the interest of the safety and health of both DMAPS’ employees and the incarcerated raises a legitimate concern about the agency’s willingness to address an overcrowding problem in its facilities that currently would make it impossible to follow the CDC-endorsed guidelines for correctional facilities.

Even if all of these problems could be resolved, however, they would not sufficiently address the risk of serious medical harm to Petitioners. As Dr. Homer Venters, the former chief medical officer in the New York City jail system, recently said, “[i]n ordinary times, crowded

³⁷ Press Release, West Virginia Department of Military Affairs and Public Safety, *Lawsuit targets public safety, health amid COVID-19 response* (Apr. 5, 2020) <https://dmaps.wv.gov/News-Announcements/Pages/-Lawsuit-targets-public-safety,-health-amid-COVID-19-response.aspx>. App. 76-77.

³⁸ *Id.*

³⁹ *Id.*

jails overlook prisoners' medical problems and struggle to separate them based on their security classification...[i]f jails have to add quarantines and sequestration of high-risk prisoners to the mix...they will find managing a COVID-19 outbreak '*simply almost impossible*.'"⁴⁰

In other parts of the country, government officials have recognized this reality and started releasing medically vulnerable pre-trial detainees, as well as other groups of incarcerated persons. The Supreme Court of New Jersey mediated a process between the N.J. Office of the Public Defender, the ACLU of New Jersey, the N.J. Office of the Attorney General, and the County Prosecutors Association that resulted in a court order creating a presumption of release *all* incarcerated people serving a county jail sentence or a sentence as a condition of probation, resulting in the release of over 1,000 people.⁴¹ Other courts have started granting specific applications for release of pretrial detainees and other groups of eligible individuals, with many more such applications pending around the country.⁴²

Courts and public officials in other jurisdictions, including in Los Angeles, California and parts of Ohio and Texas, have already responded by taking steps to facilitate the release of elderly and sick prisoners, and to reduce jail populations by refusing the admission to jails of individuals arrested on certain charges.⁴³ In Iran, one of the first countries to see the outbreak of

⁴⁰ Madison Pauly, *To Arrest the Spread of Coronavirus, Arrest Fewer People*, Mother Jones (Mar. 12, 2020), https://www.motherjones.com/crime-justice/2020/03/coronavirus-jails-bail-reform-arrests/?utm_source=The+Appeal&utm_campaign=0a31827f48-EMAIL_CAMPAIGN_2018_08_09_04_14_COPY_01&utm_medium=email&utm_term=0_72df992d84-0a31827f48-58432543.

⁴¹ See e.g., *Consent Order*, Supreme Court of New Jersey, Docket No. 084320 (Mar. 22, 2020), App. 78-86.

⁴² See Prison Policy Initiative, *Responses to the COVID-19 Pandemic*, <https://www.prisonpolicy.org/virus/virusresponse.html> (last visited Apr. 1, 2020); see also Court Actions to Reduce Incarceration in Covid. App. 92-101.

⁴³ See, e.g., Alene Tchekmedyan et al, *L.A. County releasing some inmates from jail to combat coronavirus*, L.A. Times, (Mar. 16, 2020, 7:25 PM), <https://www.latimes.com/california/story/2020-03-16/la-jail-population-arrests-down-amid-coronavirus>; Cory Shaffer, *Cuyahoga County official will hold mass plea, bond hearings to reduce jail population over coronavirus concerns*, Cleveland.com (Mar. 12, 2020), <https://www.cleveland.com/court-justice/2020/03/cuyahoga-county-officials-will-hold-mass-plea-hearings-to-reduce-jail-population-over-coronavirus-concerns.html>; WKBN Staff, *Local county jails making changes due to coronavirus outbreak*, WKBN (Mar. 12, 2020) ("The Mahoning County [Ohio] Sheriff's Office is refusing all non-violent misdemeanor arrests at

COVID-19, 85,000 incarcerated people were temporarily released back to their communities amid virus concerns.⁴⁴

In a recent court filing seeking the release of federal immigration detainees, Dr. Marc Stern, a correctional health expert, concluded that “[f]or detainees who are at high risk of serious illness or death should they contract the COVID-19 virus, release from detention is a critically important way to meaningfully mitigate that risk.” For that reason, Dr. Stern has recommended the “release of eligible individuals from detention, with priority given to the elderly and those with underlying medical conditions most vulnerable to serious illness or death if infected with COVID-19.”⁴⁵

Another correctional health expert in that same court case, Dr. Robert Greifinger, concluded that “even with the best-laid plans to address the spread of COVID-19 in detention facilities, the release of high-risk individuals is a key part of a risk mitigation strategy.” Accordingly, in his opinion, “the public health recommendation is to release high-risk people from detention, given the heightened risks to their health and safety, especially given the lack of a viable vaccine for prevention or effective treatment at this stage.”⁴⁶

Release protects the people with the greatest vulnerability to COVID-19 from transmission of the virus and also allows for greater risk mitigation for all people held or

the county jail”), <https://www.wkbn.com/news/coronavirus/mahoning-county-jail-refusing-some-inmates-due-to-coronavirus-outbreak/>; see also Charles Scudder, *Facing coronavirus concerns, Collin County [Texas] Sheriff asks police not to bring petty criminals to jail*, Dallas Morning News (Mar. 12, 2020 5:57 PM), <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>.

⁴⁴ *Hard-hit Iran frees more prisoners amid coronavirus outbreak*, AL JAZEERA (Mar. 17, 2020), <https://www.aljazeera.com/news/2020/03/hard-hit-iran-frees-prisoners-coronavirus-outbreak-200317110516495.html>.

⁴⁵ Decl. of Dr. Marc Stern ¶¶ 9, 11, *Dawson v. Asher*, (No. 2:20-CV-409-JLR-MAT) (Mar. 16, 2020), App. 1-3.

⁴⁶ Decl. of Dr. Robert Greifinger ¶ 13, *Dawson v. Asher*, (No. 2:20-CV-409-JLR-MAT) (Mar. 16, 2020), App. 4-6.

working in prisons and jails. Release of the most vulnerable people also reduces the burden on West Virginia's limited health care infrastructure, as it lessens the likelihood that an overwhelming number of people will become seriously ill from COVID-19 at the same time.

An overwhelming majority of those who have publicly expressed any public opinion on appropriate measures in light of COVID-19 all indicate that release of any qualified persons where possible remains the best solution and the most effective way to allow for compliance with proper protocols. In order to undertake the appropriate mitigating measures, certain considerations outside of the normal realm must be made. This notion has been acknowledged by prosecuting attorneys and community leaders alike all across the country.

Perhaps most compelling is the following excerpt from United States Attorney General William Barr in a recent Memorandum to United States District Attorneys and other Departmental Leaders:

We have an obligation to minimize these risks to the extent possible while remaining faithful to the [Bail Reform Act's] text and discharging our overriding obligation to protect the public. That means you should consider not seeking detention to the same degree we would under normal circumstances—specifically, for those defendants who have not committed serious crimes and who present little risk of flight (but no threat to the public) and who are clearly vulnerable to COVID-19 under CDC Guidelines. In this analysis, the risk of flight and seriousness of the offense must be weighed against the defendant's vulnerability to COVID-19.⁴⁷

G. Measures Already Taken to Address COVID Outbreaks in West Virginia Jails and Prisons

In West Virginia, it has been reported that the State Department of Military Affairs and Public Safety have met with this Court, and more than 600 individuals, including at least 70

⁴⁷ United States Attorney General William Barr, Memorandum for All Heads of Department Components and Federal Prosecutors (Apr. 6, 2020), <https://www.justice.gov/file/1266901/download>. App. 102-103.

parolees, have been released since the pandemic started.⁴⁸ Additionally, this Court on March 27, 2020 issued guidance to Circuit Courts and Magistrates advising those judicial officers to work with county prosecutors to identify pretrial detainees who, in light of the COVID-19 pandemic, would be good candidates to be released on personal recognizance or reduced bond.⁴⁹

The laudable actions taken thus far by judicial officers and state government agencies in West Virginia will protect the health of the public, of the incarcerated, and of the employees at the state's jails and correctional facilities. However, with every moment that passes in this pandemic the risk increases that those incarcerated and the employees in our regional jails may become infected with COVID-19. Petitioners are individuals that remain incarcerated at the time of this filing and are deserving of release—or the ability to negotiate reduced bond for release—in light of this extraordinary public health crisis.

H. Recently Enacted State Legislation to Reduce Jail and Prison Populations

Against this backdrop, it is notable that the West Virginia legislature has recognized the harms of overcrowding in its jails and passed legislation in the 2020 session to address the issue.

The West Virginia legislature expressed intent to reduce certain forms of incarceration and address overcrowding in the criminal justice system with the 2020 passage of Senate Bill 620, which, when it goes into effect approximately six weeks from the date of this writing on May 19, 2020, will authorize the commissioner of the Division of Corrections and Rehabilitation to approve home plans for certain incarcerated individuals.⁵⁰ The West Virginia legislature further expressed intent to reduce certain forms of incarceration and address overcrowding in jails by the 2020 passage of House Bill 2419, which, when it goes into effect approximately nine weeks from the date of this writing on June 5, 2020, will require magistrates to release from jail

⁴⁸ Leslie Rubin, Eyewitness News, *W. Va. Taking Steps to Reduce Inmate Population Amid COVID-19 Pandemic* (Apr. 1, 2020), <https://wchstv.com/news/coronavirus/wva-taking-steps-to-reduce-inmate-population-amid-covid-19-pandemic>.

⁴⁹ See Supreme Court of Appeals of West Virginia, Memorandum (Mar. 27, 2020), App. 104-105.

⁵⁰ S.B. 620, 2020 Reg. Leg. Sess. (W. Va.).

on recognizance individuals who have been charged with certain misdemeanors and sets a “least restrictive” standard for other offenses.⁵¹

Petitioners are people who pose little to no safety risk to the public and their release would be in the interest of public health, *many petitioners would qualify for release in mere weeks or months once Senate Bill 620 and House Bill 2419 go into effect, as would others pursuant to other terms of release, such as compassionate release.* Their release now, as opposed to weeks in the future, may well be the difference between life and death.

Categories of Petitioners Seeking Release

The petitioners in this action fall into five categories:

- (1) Petitioners who could be released on recognizance;
- (2) Petitioners who could be released on reduced bail;
- (3) Petitioners who could be released on parole;
- (4) Petitioners who, because of factors including age/and or underlying medical condition and more, including credible evidence of actual innocence, are particularly vulnerable to serious illness or death if infected by COVID-19, and therefore are candidates for compassionate release; and
- (5) Petitioners who are otherwise worthy in light of extraordinary circumstances, and who do not fall within the above-specified categories but who are qualified in for consideration before this Court.

This Petition seeks the immediate release of the herein named Petitioners from the regional jails and correctional facilities in West Virginia on the grounds that continuing to hold them on bail, parole, or in custody, and in light of age, medical issues, or other constitutional

⁵¹ H.B. 2419, 2020 Reg. Leg. Sess. (W. Va.).

considerations, constitutes deliberate indifference to the risk of serious medical harm in violation of the Fourteenth Amendment and cruel and unusual punishment in violation of the Eighth Amendment of the U.S. Constitution.

III. PETITIONERS

The undersigned counsel, Lora Greer Walker, is an Attorney for the Habeas Corpus Division of West Virginia Public Defender Services. Public Defender Services is the main office of the state agency which funds the Public Defender Corporations. Public Defender Corporations are organized at the circuit court level and operate in the majority of judicial circuits throughout the state. Chief Public Defenders (hereinafter “Chiefs”) of the Public Defender Corporations were asked to participate in this filing by identifying specific clients as qualifying individuals worthy of relief under the categories elucidated herein. The Chiefs who elected to participate, along with other attorneys from each Public Defender Corporation, were tasked with compiling information regarding each client to be received and evaluated by the undersigned, who subsequently formulated this Petition for consideration before this Honorable Court.

The participating Public Defender Corporations, on behalf of the Petitioners submitted by each, have designated the undersigned counsel to represent the Petitioners in this matter. Lora Walker, along with undersigned co-counsel, Loree Stark, who serves as the Legal Director for the American Civil Liberties Union of West Virginia, make and respectfully submit this application on behalf of the below-named Petitioners and others not yet identified or named.

A. Petitioners Eligible for Release on Recognizance

1. Donald Miller, Greenbrier County (Case No. 20-F-119). Pretrial Grand Larceny with \$2,500 bond, of which he must post ten percent. Mr. Miller is indigent, unable to find \$250.00, and thus seeks a personal recognizance bond.
2. Eric Wayne Robinson, Pocahontas County (Case Nos. 17-M38M-00472; 17-M38M-00473). Mr. Robinson has misdemeanor charges and would be eligible for bond under the new legislation. His charge is Failure to Appear.

3. Christopher Burdette, Roane County (Case No. 19-B-101). Mr. Burdette is charged with destruction of property and is held on a \$10,000 bond. He has been incarcerated since September 28, 2019. According to counsel in the underlying matter, a hearing on an agreement in principle for a reduced misdemeanor destruction of property was scheduled before the Supreme Court issued its Order in response to COVID-19. If the agreement had been accepted, he would likely be discharged.

B. Petitioners Eligible for Release on Parole

4. Kevin Johnson, Mingo County (Case Nos. 16-F-51; 19-F-87). Mr. Johnson has a Rule 35 motion for reduction of sentencing pending. Counsel for Mr. Johnson in underlying proceedings reports that he has done well in prison, and he picked up two charges for which he is currently incarcerated while in the last month of his probation on a 2016 drug charge. He has since discharged the 2016 sentence. He was not alleged to be violent, did very well on probation until the last month, and counsel for Mr. Johnson reports that “he would be a great candidate for relief.”
5. Kenneth Lee Cyrus, Mingo County (Case No. 19-F-77). Mr. Cyrus is serving time for conspiracy to commit grand larceny. He has a Rule 35 motion for a reduction of sentence pending and previously applied for drug court but was not admitted. He has currently served just more than 243 days of his sentence, which is a term of not less than one nor more than five years.
6. Levi Arnold, Greenbrier County (Case No. 18-F-1(D)). Mr. Arnold, who recently failed to complete the program requirements at the Anthony Correctional Center, is eligible for parole.
7. Nelson Cortes, Pocahontas County (Case No. 18-F-22). Mr. Cortes is forty-five years old and his alternative sentence was revoked late last year due to substance use. He is currently serving a sentence of one to five years for conspiracy and is eligible for parole under current law. His underlying counsel has moved for parole, and an Agreed Order

was recently submitted to the court. Mr. Cortes has hypertension and would be highly susceptible to COVID-19 complications.

8. Roy Lee Ailiff III, Mingo County (Case Nos. 15-F-155; 19-F-67). Mr. Ailiff is currently incarcerated for forging or uttering other writing and attempting to flee from an officer with the use of a vehicle. Underlying counsel for Mr. Ailiff believes Mr. Ailiff has possibly not received credit for all time served, and therefore believes Mr. Ailiff should be parole eligible.
9. Benny Lee Horn, Mingo County (Case No. 17-F-66). Mr. Horn was on probation for a few months several years ago and was subsequently arrested in Kanawha County, which caused the revocation of that probation. His underlying conviction is breaking and entering.

C. Petitioners Who Could Secure Release with a Reduced Bond

10. Crystal Aston, Ohio County (Case Nos. 20-M35F-00025; 20-M35M-00496). Ms. Aston is currently awaiting trial on charges of grand larceny and possession of a controlled substance. She discharged a jail sentence in Marshall County as of February 2020 but remains in jail for charges in Ohio County. She is charged with a felony and a misdemeanor with a \$3,500 surety bond (including property or bonding company). Therefore, she could be released with a reduced bond or on personal recognizance on the Ohio County charges.
11. Joseph Ayers, Marshall County (Case Nos. 19-M25M-01141; 19-M25F-00175). Mr. Ayers was indicted for transferring a stolen 1996 Saturn vehicle from Pennsylvania into West Virginia. He has a plea agreement that has not yet been docketed, and the State has agreed to recommend his release on probation, per Mr. Ayers' counsel in the underlying proceedings. His bond is set at \$5,000 with ten percent to the court. He could be released on a reduced bond amount or personal recognizance pending the plea hearing.
12. Melanie Blake, Marshall County (Marshall County Case No. 19F-478; Marion County Case No. 19F-478). Ms. Blake is incarcerated on Marshall County charges of grand

larceny and on Marion County charges for receiving a stolen vehicle. The bond in Marshall County is set at \$7,500 with ten percent to the court and the bail in Marion County is set at \$10,000 surety with an additional twelve-dollar fee. She could be released on a reduced bond or personal recognizance.

13. Destiny Lindsay, Marshall County (Case No. 20-F-11). Ms. Lindsay is incarcerated pending arraignment on one count of conspiracy to deliver meth. Her bond is \$5,000 surety, and she could make a reduced bail amount; or, alternatively, she could be released on personal recognizance.
14. Joshua Noland, Tyler County (Case No. 20-M48F-00007). Mr. Noland is incarcerated on a felony charge for reckless fleeing and has \$25,000 surety bond with home confinement. This bond is much higher than the usual \$5,000 to \$10,000 amount per felony, with the additional expenses of home confinement and corresponding attached. Thus, this bond could be reduced to an affordable amount with consideration to remove the home confinement requirement or to waive the home confinement fees.
15. Skylar Shipley, Marshall County (Case No. 19-M25F-00178). Mr. Shipley is twenty one years old and is incarcerated on a bond revocation resulting from new conspiracy and shoplifting charges. His hearing in Magistrate Court is scheduled for May 11, 2020. His bond could be reinstated, or, in the alternative, he could be released on personal recognizance (pending the May 11 hearing).
16. John Sprouse, Wood County (Case Nos. 20-M54M-00716; 19-M54M-03376). Mr. Sprouse is forty-five years old and was serving a ninety-day term of home confinement beginning March 2nd, 2020. He is presently incarcerated with a \$1,500 surety bond for drug possession charges and has a revocation of home confinement pending. His sentence will either be reverted back to home confinement or will otherwise discharge on April 22, 2020. He could make bond if it were lowered.
17. Dalton Wayne Cain, Pocahontas County (Case Nos. 19-F-09; 19-M38M-00590; 19-M38M-00662; 19-M38M-00590). Mr. Cain is nineteen years old and is a pretrial felony

client incarcerated on breaking and entering and grand larceny charges. He also has misdemeanor charges for destruction of property, fleeing on foot, petit larceny, and obstructing. His bond was revoked because he was charged with new misdemeanors while out on bond. All of his charges are notably non-violent, and he is extremely young, thus making the reinstatement of his bond appropriate in light of the global pandemic.

18. April Rogers, Roane County (Case No. 19-F-101). Ms. Rogers is incarcerated on charges of entering without breaking, grand larceny, and two counts of conspiracy. Her original bond was reduced to \$10,000. The parties have reached an agreement in principle to a plea to grand larceny with a recommendation of drug court or drug treatment. Ms. Rogers is a candidate for further-reduced bond.
19. Ashley Parrish, Roane County (Case No. 20-B-14). Ms. Parrish is incarcerated and is charged with nineteen counts of fraudulent use of an access device. Her bond in Roane County has been reduced by agreement to \$2,000, but she also has charges pending and a bond set in Mineral County, which should be considered for reduction.
20. John Miller, Jackson County (Case No. 20-B-9). Mr. Miller has been incarcerated since January 1, 2020 on a charge of transporting a controlled substance into the state. The case is currently bound over awaiting presentation to a grand jury and bond was last modified on March 20, 2020, to \$2,500 with condition of inpatient rehabilitation. Even if Mr. Miller could post bond, there is a shortage of inpatient beds and many facilities are not accepting new patients due to COVID-19.
21. Matthew Nunn, Jackson County (Case No. 19-F-132). Mr. Nunn has been incarcerated since July 4, 2019 on charges of unlawful assault and strangulation. Mr. Nunn has had two competency evaluations, both of which found him competent. His bond is currently set at \$100,000, and he is unable to make that bond.
22. Adrian Pennington, Jackson County (Case No. 20-F-20). Mr. Pennington is incarcerated and awaiting sentencing after his plea to reckless fleeing on February 24, 2020. The State

has agreed to stand silent at sentencing. His bond is currently set at \$3,000. He also has a pending parole violation.

23. Jack Williams, Jackson County (Case No. 20-F-30). Mr. Williams has been incarcerated since February 14, 2020 on a charge of burglary. His bond is currently set at \$10,000. He has also a pending parole violation in Kanawha County.
24. Scotty Sowards, Jackson County (Case No. 19-B-153). Mr. Sowards was arrested in October 2019 for alleged possession of methamphetamines with intent to deliver, and also on a fugitive warrant from Kentucky. According to underlying counsel for Mr. Sowards, his bond was lowered to \$10,000 on the possession charge, but he is being held without bond on the fugitive warrant from Kentucky. He was not indicted during the last grand jury session or in an intervening special grand jury session on these charges.
25. Larry Joseph, Calhoun County (Case No. CC-07-2020-B-1). Mr. Joseph has been incarcerated since December 2019 on charges of possession with intent to deliver for both marijuana and methamphetamines, as well as conspiracy charges related thereto. He has a limited criminal history, and his bond was reduced after a hearing on March 18, 2020. His family now indicates that, in light of statewide shutdown, they are unable to afford what they previously believed they could pay. As of the time of this filing, an agreed order for a personal recognizance bond with suspended home confinement costs has been presented to the presiding judge for consideration.
26. Samantha Sexton, Mingo County (Case No. 19-B-128). Ms. Sexton is incarcerated and awaiting indictment. Her history includes nonviolent substance-related offenses and property offenses. Previously revoked, bail was reinstated in late January with the condition that she be admitted to the Fresh Start Program and complete Day Report. However, the Fresh Start interview was canceled due to the jail's refusal to transport her due to COVID-19. Her bond should be modified since it is not presently possible for her to comply with the terms.

27. Steve Randall Gooslin, Mingo County (Case No. 20-B-14). Mr. Gooslin has been incarcerated since February 6, 2020, having waived his preliminary hearing in exchange for a bond reduction from \$35,000 to \$10,000 and early disclosure of the State's evidence. He is charged with several property-related, nonviolent crimes and cannot make bond unless it is reduced to personal recognizance.
28. Ida Kay Castle, Mingo County (Case No. J20-F3). Ms. Castle is fifty-three years old and is serving a sentence for nonviolent misdemeanors. She recently broke her leg, reports that she is in declining health, and is not receiving proper medical treatment in jail. She was sentenced on March 10, 2020, and she was given 112 days towards her sentence. Underlying counsel for Ms. Castle estimates that her sentence would discharge in approximately seven weeks from that day.
29. Weston Daniel Rollyson, Mingo County (Case No. 20-B-15). Mr. Rollyson was charged with possession with intent to deliver and waived his preliminary hearing on February 20, 2020 in exchange for an agreed bond reduction on a \$2,000 open bond. As of the date of filing this Petition, underlying counsel for Mr. Rollyson has reported that Mr. Rollyson was arrested on March 12, 2020, presumably for failure to post bond.
30. Albert Matthew Moore, Mingo County (Case Nos. 20-M30F-00085; 20-M30M-00043; 20-M30M-00277). Mr. Moore was arrested on March 25, 2020 for destruction of property and another charge. He had a preliminary hearing set on April 2, 2020, the outcome of which is unknown. Per his financial affidavit (as reported by underlying counsel), Mr. Moore has a monthly income of \$300.
31. Brianna Blankenship, Mingo County (Case Nos. 20-M30M-00045; 19-M30M-0130). Ms. Blankenship has been evaluated for competency to stand trial and for criminal responsibility, with no report having yet been received. She has one charge for contraband (now confirmed to be rock salt), which was found when she was arrested on the bail piece from her other charge, which was \$1,200 on twelve counts of false 911

reporting. Her bond is currently set at \$5,000 for the contraband charge and she could potentially make bond at a reduced amount.

D. Petitioners Eligible for Compassionate Release

32. Jeremy Kiser (Case No. 20-M54M-00538) is currently serving nine months of time for a felony reduction plea to petit larceny. Mr. Kiser has well-documented health issues and is in a high-risk group that would be very susceptible to COVID-19. He was offered home confinement to get him out of jail, but he declined. This is likely due to the lack of any place at which he can reside while on home confinement. While counsel is unclear as to what can be further offered to Mr. Kiser, he appears to be a good candidate for compassionate release. Further, he even requested to be housed at South Central Regional Jail to be closer to his doctors in Charleston. If considered for relief, resources can be readily identified in an effort to obtain placement for Mr. Kiser where he could reside upon release. This service is available through the assistance of Public Defender Services' Criminal Justice Resource Specialist, and the same resources would be available to any individual needing assistance in this matter. While placement cannot be guaranteed, every effort will be made to seek possible options.
33. Lorenzo Thomas (Case No. 20-F-61) is currently serving time on three counts of possession with intent to deliver. His bond is currently set extremely high at \$300,000, with a motion recently denied by the judge overseeing this matter. Mr. Thomas is a good candidate for compassionate release as he is in an extremely high risk health category and, as a result, is very likely to contract COVID-19 and experience severe medical issues if exposed.
34. Dakota Sayre, Jackson County (Case No. 19-F-35). Mr. Sayre is incarcerated and pending sentencing for a third offense shoplifting incident. He was on a high-low plea deal but left a rehabilitation program early, and resultantly received the high end of the high-low plea. Mr. Sayre has approximately 180 days of credit for time served. He is worthy of evaluation for compassionate release as he currently has an abscessed tooth

that makes him particularly vulnerable to complications from COVID-19 and to the date of this filing, his attorney has not received any records to indicate that this medical issue has been addressed.

35. Raymond Cochran, Pocahontas County (Case Nos. 19-M38M-00696; 19-M38M-00715).

Mr. Cochran is 50 years old and per his attorney, is in fragile health with multiple pre-existing conditions. He is likely to be at high risk for COVID-19 complications. A Rule 35 Motion is currently pending to grant alternative sentencing. Mr. Cochran is serving a misdemeanor sentence of one year. Due to his veteran status and compromised health, compassionate release would be appropriate.

36. Doug Lee Queen, Pocahontas County (Case Nos. 19-M38M-00575; 20-M38M-00007).

Mr. Queen is serving an eighteen month sentence on two misdemeanors. A motion to reconsider is currently pending before the court. He has an elderly mother who depends on him to assist her with basic needs and she lives alone in a secluded location. He should receive compassionate release in light of his misdemeanor status and the fact that his elderly mother depends on him.

37. Charles Mills (Case No. 20-M30-F-00067). Mr. Mills is charged with grand larceny, which carries a possible penalty of not less than one nor more than ten years, and conspiracy to commit grand larceny, which carries a penalty of not less than one nor more than five years. He waived his preliminary hearing on March 25, 2020 and is awaiting indictment. In a recent video conference in which bail was reduced to \$2,500 cash with ten percent to the court on March 25, 2020, he had visible and audible respiratory issues that were apparent to his counsel.

E. Petitioners Otherwise Worthy of Consideration for Release

38. Casey Joe Matthews (Case No. S19-F66). Mr. Matthews was sentenced to one to three years for attempted burglary after being dismissed from a rehabilitation program for violations of that program during his furlough. Special Prosecutor John Bennett represents the State in this matter and has indicated to counsel for Mr. Matthews that he

would not oppose Rule 35 relief if he agreed on new rehabilitation measures. No bond has been allotted in this case.

39. Misty Jane Pritt, Pocahontas County (Case No. 18-M-01). Ms. Pritt is currently serving a sentence on two misdemeanor charges after entering a plea. She also has a pending felony in Randolph County. Ms. Pritt is thirty-two years old and is a mother of two. She was recently sentenced in Circuit Court, but she would like to be in a drug rehabilitation facility. Due to her lifelong history of drug use and traumatic childhood experiences (all available in the court record), release would be appropriate, especially in light of the fact that she has two small children who need care during the pandemic.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

In accordance with West Virginia Rule of Appellate Procedure 16(d)(6), Petitioners respectfully submit that this case is appropriate for disposition by memorandum decision without the need for oral argument.

V. ARGUMENT

A. Standard of Law

This Court has original jurisdiction to adjudicate petitions for writs of habeas corpus, provided that the contentions raised “have not been previously and finally adjudicated or waived” in the proceedings that resulted in conviction, prior habeas proceedings, or other proceedings seeking relief from the conviction or sentence pursuant to W. Va. Code Ann. § 53-4A-1(a) (West 2018). Petitioners have made no prior application for the relief requested herein. To the extent applicable, this Petition complies with the proper Rules of Appellate Procedure; however, the Rules Governing Postconviction Habeas Corpus Proceedings were also followed for guidance in this matter.

B. Petitioners' Incarceration Amidst the Likely COVID-19 Outbreak in West Virginia's Regional Jails and Prisons Violates their Right to Constitutional Conditions of Confinement

Corrections officials have a constitutional obligation to provide for detainees' reasonable safety and to address their serious medical needs.⁵² Petitioners are both pretrial and post-conviction detainees. The Fourteenth Amendment's Due Process Clause governs conditions-of-confinement claims like these for pretrial detainees, while the Eighth Amendment governs post-conviction detainees. While pretrial detainees are presumed innocent, and therefore merit greater protection,⁵³ the distinction is irrelevant here, as the harms of actual and potential COVID-19 contraction detailed herein clearly satisfy the Eighth Amendment's more restrictive standard.

This obligation requires corrections officials to protect detainees and incarcerated persons from infectious diseases like COVID-19; officials may not wait until someone tests positive for the virus, and an outbreak begins.⁵⁴ By then it is too late. That one individual would have almost certainly infected untold numbers of people before they began displaying symptoms.

Corrections and Jail officials violate this affirmative obligation by showing "deliberate indifference" to the substantial risk of serious harm.⁵⁵ With respect to an impending infectious disease like COVID-19, deliberate indifference is satisfied when corrections officials "ignore a

⁵² See *DeShaney v. Winnebago County Dept. of Soc. Services*, 489 U.S. 189, 200 (1989) ("[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause"); *Youngberg v. Romeo*, 457 U.S. 307, 315–16, 324 (1982) (the state has an "unquestioned duty to provide adequate . . . medical care" for detained persons); *Wilson v. Seiter*, 501 U.S. 294, 300 (1991); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Brown v. Plata*, 563 U.S. 493, 531–32 (2011); *Farmer v. Brennan*, 511 U.S. 825, 834 (remanding for determination as to whether correctional officer violated Eighth Amendment by failing to prevent "a substantial risk of serious harm").

⁵³ See *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979).

⁵⁴ *Helling v. McKinney*, 509 U.S. 25, 33–34 (1993) ("That the Eighth Amendment protects against future harm to inmates is not a novel proposition. . . It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them"); *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) ("[C]orrectional officials have an affirmative obligation to protect [forcibly confined] inmates from infectious disease"); see also *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) ("[H]aving stripped [prisoners] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course.").

⁵⁵ *Wilson*, 501 U.S. at 303.

condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year,” even when “the complaining inmate shows no serious current symptoms.”⁵⁶

Here, COVID-19 is “sure or very likely to cause serious illness,” and even waiting until “next week” to attempt internal mitigation efforts may be too long. In other words, the harmful “condition of confinement” is confinement itself. In addition to the immediate release of all medically vulnerable petitioners, the facilities must ensure conditions exist that meet the standards outlined by public health experts and the Center for Disease Control. The failure to do so constitutes deliberate indifference.⁵⁷

A related but distinct right of pretrial detainees—who are presumed innocent and therefore entitled to greater protection from unconstitutional conditions of confinement—is that their pretrial confinement cannot amount to punishment.⁵⁸ Punishment—and therefore deliberate indifference—is established if the jailer’s conduct is either not rationally related to a legitimate, nonpunitive government purpose or excessive in relation to that purpose.⁵⁹ Both elements are satisfied here. Even if a facility’s current spacing of detainees and provision of healthcare would serve the legitimate purpose of jail health and safety in normal times, those procedures—are now endangering health and safety in the wake of COVID-19 by keeping people in the jail. Hence, continuing to detain Petitioners is not rationally related to the goal of health and safety (both the

⁵⁶ *Helling*, 509 U.S. at 33 (holding that a prisoner “states a cause of action . . . by alleging that [corrections officials] have, with deliberate indifference, exposed him to conditions that pose an unreasonable risk of serious damage to future health”) (emphasis added); see also *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (citing *Farmer*, 511 U.S. at 842) (court “may infer the existence of [deliberate indifference] from the fact that the risk of harm is obvious”).

⁵⁷ See, e.g., *Hare v. City of Corinth, Miss.*, 74 F.3d 633, 644 (5th Cir. 1996) (“even where a State may not want to subject a detainee to inhumane conditions of confinement or abusive jail practices, its intent to do so is nevertheless presumed when it incarcerates the detainee in the face of such known conditions and practices.”). See also, Public Health Experts’ Declarations, *supra* footnote 6.

⁵⁸ *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (“[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.”); *id.* at n.16 (pretrial detainees retain greater protections than convicted counterparts); see also *Vella v. State of Va.*, 805 F.2d 394 (4th Cir. 1986) (allowing pretrial detainee to prove allegations establishing conditions as punishment) (“Nor can we say on the current state of the record that it is beyond doubt that Vella can prove no set of facts entitling him to relief.”).

⁵⁹ *Id.* at 561; *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473–74 (2015).

jail's and the public's) and is indeed excessive in relation to the course of conduct that would in fact achieve that goal: release with appropriate support protections in place.⁶⁰

C. Because the Right to Pretrial Liberty is Fundamental, Detention of each Pretrial Petitioner Must Satisfy Heightened Scrutiny

In addition to the right to safe and adequate conditions of incarceration, pretrial petitioners have a fundamental right to pretrial liberty that may only be infringed when necessary to advance a compelling government interest.⁶¹ The only government interests deemed compelling enough to justify restricting pretrial liberty are promoting future court appearance⁶² and community and witness safety;⁶³ moreover, if the government's interests "could reasonably be assured by ... alternate [conditions] of release," pretrial confinement is unconstitutional.

The requisite evaluation of whether an arrestee presents any established risk of flight or violence, and then whether conditions short of detention can mitigate that risk, must occur for each

⁶⁰ See *Plata*, 563 U.S. 493 (ordering release of inmates to correct overcrowding that violated Eighth Amendment); Memorandum and Order, *Thakker v. Doll*, No. 20-CV-0480 (M.D. Pa. Mar. 31, 2020) (categorically releasing petitioners who "suffer[] from chronic medical conditions and face[] an imminent risk of death or serious injury if exposed to COVID-19).

⁶¹ *United States v. Salerno*, 481 U.S. 739, 750 (1987) (Noting "the individual's strong interest in liberty" is of a "fundamental nature."); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."); *United States v. Montalvo-Murillo*, 495 U.S. 711, 716 (1990) (procedures resulting in pretrial detention implicate a "vital liberty interest"). See also *Oviatt ex rel. Waugh v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992) (citing *Baker v. McCollan*, 443 U.S. 137, 144, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979) ("The Supreme Court has recognized that an individual has a liberty interest in being free from incarceration absent a criminal conviction."); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 779 (9th Cir. 2014) ("subsequent Supreme Court decisions" post-*Salerno* "have confirmed that Salerno involved a fundamental liberty interest and applied heightened scrutiny...") (citing *Reno v. Flores*, 507 U.S. 292, 301 (1993)).

⁶² See, e.g., *Stack v. Boyle*, 342 U.S. 1, 5 (1951); *Bell v. Wolfish*, 441 U.S. 520, 533 (1979); *Bandy v. United States*, 82 S. Ct. 11, 12 (1961) (Douglas, J., in chambers) ("The purpose of bail is to insure the defendant's appearance and submission to the judgment of the court.")

⁶³ *United States v. Salerno*, 481 U.S. 739, 749, 752 (1987). The inclusion of public safety as a valid government interest to justify pretrial incarceration was established for the first and only time in *Salerno*, in which the Supreme Court upheld the constitutionality of the 1984 Federal Bail Reform Act. The 1984 Federal Bail Reform Act operates narrowly: detention is limited to cases in which a person is accused of a "specific category of extremely serious offenses," and requires the government to establish, by clear and convincing evidence, at an adversarial hearing with defense counsel that the individual poses a risk of danger or flight that no less restrictive conditions can manage. *Id.* at 750. No less stringent scheme of pretrial detention has been endorsed by the federal courts. See also *Sellers v. United States*, 89 S.Ct. 36, 38 (1968) (Black, J., in Chambers) (Detention only justified if a danger presented by the individual that "so jeopardizes the public that the only way to protect against it would be to keep the applicant in jail."). *Pugh v. Rainwater*, 572 F.2d 1053, 1058 (5th Cir. 1978); see also *In re Humphrey*, 228 Cal. Rptr. 3d 513, 535 (Ct. App. 2018); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780 (9th Cir. 2014); cf. *Bearden v. Georgia*, 461 U.S. 660, 672 (1984).

arrestee on a case-by-case basis. In light of the COVID-19 pandemic, detention of pretrial petitioners undoubtedly violates their fundamental right to pretrial liberty. First, the government cannot reliably project when pretrial petitioners will be brought to court, given emergency protocols and closures in response to the virus. The government's interest in promoting court appearance and preventing flight is therefore reduced. Second, under the COVID-19 outbreak, booking and holding people in jail presents a direct *threat* to the public safety as it will increase transmission of the virus throughout and beyond the jail.⁶⁴

While the government's interests that might otherwise justify pretrial detention are drastically diminished in light of the outbreak, the individual interest in liberty could not be stronger. Prior to the outbreak, the devastating effect of even a short-term stay in jail pretrial has been well recognized.⁶⁵ In light of the outbreak, individuals incarcerated—particularly medically vulnerable petitioners—face the prospect of permanent lung damage, serious illness, or death.

The continued incarceration of pretrial petitioners, absent findings by clear and convincing evidence that detention is the least restrictive means to advance the government's interest in future court appearance and public safety in each individual case, violates substantive due process principles.

VI. PRAYER FOR RELIEF

WHEREFORE, Petitioners request this Court issue a writ of habeas corpus and order:

⁶⁴ Additionally, there is some indication that crime rates overall will reduce in light of the coronavirus outbreak. See L.A. Times, *Arrests by LAPD and Sheriff's Department Drop Amid Coronavirus Outbreak* (March 18, 2020), <https://cutt.ly/atRDNr3>; Tony Sloan, *Could the Coronavirus Fears be Decreasing Memphis Crime Rates?* (March 13, 2020 6:12 p.m.), <https://cutt.ly/5tRD14D>.

⁶⁵ *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975); *Barker v. Wingo*, 407 U.S. 514, 532-33 (1972); *Schultz v. State*, 330 F. Supp.3d 1344, 1361 (N.D. Ala. 2018) (“deprivation of pretrial liberty takes a high toll on a criminal defendant, and the negative effects of pretrial incarceration compound each day that a defendant is detained... detention for even 24 hours can cause a defendant to lose a job.”); *Buffin v. City and County of San Francisco*, 2019 WL 1017537 at *18 ((N.D. Cal. March 4, 2019) (“individuals can also lose their housing, public benefits, and child custody, and be burdened by significant long-term debt due to a short period of detention...”); *McNeil v. Comm. Prob. Servs., LLC*, 2019 WL 633012 at *16 ((M.D. Tenn. Feb. 14, 2019) (“Detention of those arrestees... due to inability to pay the secured bail amount on the arrest warrant can result in loss of work, separation from family, undue pressure to plead guilty, and other negative consequences...”)).

- (1) for the immediate release of qualified Petitioners, with appropriate precautionary public health measures, on the ground that their continued detention violates the Fourteenth Amendment and Eighth Amendment of the United States constitution;
- (2) for remaining Petitioners, remand the matters to the circuit court on the same grounds requiring an immediate hearing and articulated reasons for not lowering bond.


In the alternative or in conjunction with the aforementioned request for relief, Petitioners request this Court within three to five business days upon review of this Petition appoint a special master to implement a collaborative and efficient process that will address the issues raised in the petitions and facilitate a resolution and provide a workable framework for similar matters going forward with respect to those similarly situated to the Petitioners.⁶⁶ A special master would:

- (1) Ensure that appropriate agencies consult and coordinate with relevant public defense agencies, defense counsel, as well as counsel for Petitioners to represent all interests in this matter;
- (2) Enlist, as appropriate or necessary, subject matter experts, to act as a panel and advise and consult with the special master in facilitating the process;
- (3) Report to this Court every 48 hours on progress, including the numbers of individuals released;
- (4) Report immediately to this court any recalcitrant or unreasonable conduct by any participant in the process.⁶⁷


⁶⁶ This request for relief mirrors the relief granted in an Order issued by Hawaii's highest court on April 2, 2020 in a similar matter. The Court, in instituting this relief, did so because it found the appointment of a special master to oversee a "collaborative effort" necessary "to address competing public health and safety concerns and to ensure that social distancing measures are being or can be effectuated within the State's jails and prisons for the safety of the inmates, the staff, and the public." *See Order of Consolidation and Appointment of Special Master*, App. 106-113.

⁶⁷ At the Court's request, Petitioners' counsel can provide a more detailed proposal for a panel framework that would incorporate interests of all parties and to advise and consult with a special master.

Respectfully Submitted on Behalf of Petitioners,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. _____

DONALD MILLER, *et al.*,

Petitioners,

v.

BETSY JIVIDEN, *et al.*,

Respondents.

CERTIFICATE OF SERVICE

I, Loree Stark, do hereby certify a copy of the foregoing **Petition for Writ of Habeas Corpus and Appendix Record** was served on counsel of record on the 8th day of April, 2020 via U.S. Mail and email, to the following:

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