

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No.: 20-cv-00977-PAB-MEH

THOMAS CARRANZA, et al.

Plaintiffs, on their own and on behalf of a class of similarly situated persons,

v.

STEVEN REAMS, Sheriff of Weld County, Colorado, in his official capacity,

Defendant.

**PLAINTIFFS' NOTICE OF SUPPLEMENTAL EVIDENCE AND AUTHORITY IN
SUPPORT OF PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF (ECF DOC. 1)**

Plaintiffs, through undersigned counsel, respectively submit the following Notice of Supplemental Evidence and Authority in Support of Plaintiffs' Request for Injunctive Relief (ECF Doc. 1) as follows:

I. Supplemental Evidence

On the night of Tuesday April 7, 2020, Plaintiffs moved for an emergency order that the Weld County Jail ("WCJ") must provide inmates who are at high-risk of serious illness or death from COVID-19 with constitutionally adequate protection from infection with the virus. ECF Doc. 1. New evidence pertinent to this Court's consideration of Plaintiffs' motion for injunctive relief has come to light. Most importantly, the number of positive cases of COVID-19 in the Weld County Jail has increased. As of the day of the filing, the most recent news coverage reflected that WCJ had one inmate who had tested positive for COVID-19.¹ By Friday, April 10,

¹ Reid, Trevor, Greeley Tribune, *Weld County Jail inmate, 4 employees test positive for COVID-19*, Apr. 1, 2020, available at <https://www.greeleytribune.com/news/weld-county-jail-inmate-several-employees-test-positive-for-covid-19/> (last viewed April 13, 2020).

2020, Plaintiffs' counsel learned directly from WCJ staff that there were fourteen inmates who they had identified as positive for COVID-19, including six inmates with positive tests and eight inmates who were presumed positive based on symptoms. A fifteenth person had tested positive but had been transferred to the hospital. Additionally, in the six days since Plaintiffs filed their motion, deaths in Weld County resulting from COVID-19 have continued to increase. With 48 deaths, Weld County now has the largest number of COVID-19 related deaths in the state, surpassing Denver.²

Since last week's filing, Plaintiffs' counsel has learned that just two days after his release from the Weld County jail, an inmate died from COVID-19 complications. **Exhibit 1, Cheryl Cook Declaration.** Charles Peterson, the inmate who died, was a 78-year-old man who had spent about 20 days in WCJ on a parole hold before he was released gravely ill with COVID-19. **Ex. 1**, pp. 1-2. WCJ released Mr. Peterson who had been exhibiting symptoms while in jail, without informing the people who picked him up and shared a home with him that he was sick. **Ex. 1**, pp. 2-3. Mr. Peterson barely made it to his home before an ambulance had to be called. **Ex. 1**, p. 2. He died of complications from COVID-19 two days later. **Ex. 1**, p. 2. Mr. Peterson's tragic story underscores the unreasonable risk of serious harm that the medically vulnerable Plaintiffs class face in the Weld County Jail.

Also since last week's filing, numerous people incarcerated in the Weld County Jail have stepped forward to share the reality of the dire conditions within the jail that made WCJ ripe for the current COVID-19 outbreak. For instance, two recently released individuals who were trustees describe openly sick inmates being required to work in the kitchen, widespread failures

² See *COVID-19 Case Data*, COLORADO DEPARTMENT OF PUBLIC HEALTH & ENVIRONMENT, <https://covid19.colorado.gov/case-data> (last viewed April 13, 2020).

to follow CDC guidelines, and failures to provide basic information to inmates about the virus and its spread within the jail. **Exhibit 2**, *Declaration of Christopher Vecchiarelli*; **Exhibit 3**, *Declaration of Ralph Brewer*.

While conditions in WCJ have improved recently, medically vulnerable inmates continue to be held in lockdown status in cells with other people who have likely been exposed to the virus. As new evidence shows, in these cells, where inmates spend 23 or more hours a day, physical distancing is impossible even with the recent changes made by WCJ. **Exhibit 4**, *Declaration of Thomas Lewis*; **Exhibit 5**, *Declaration of Helen Griffith*. Further, WCJ has not sought to interview inmates to identify who is medically vulnerable or to give those inmates single cells. **Ex. 4**, p. 2; **Ex. 5**, p. 3. As a result, medically vulnerable inmates, including Plaintiffs, are not able to practice the physical distancing that has the greatest chance of protecting them from infection and, ultimately, death.

II. Supplemental Authority

Since this case was filed, courts have continued to issue rulings that recognize the dire need for emergency action by courts, including by releasing incarcerated people who face a heightened risk of serious illness or death if they become infected. These courts openly recognize that the judiciary must act now or people will die.

1. *Swain, et al. v. Junior, et al.*, Case No. 20-cv-21457, Doc. 25 (S.D. Fla. Apr. 5, 2020). – **Exhibit 6**.

On April 4, 2020, a group of inmates in the Miami-Dade Jail filed a class action lawsuit seeking the immediate release of all incarcerated people who, like the putative Plaintiffs' class in the instant case, face a heightened risk of serious illness or death if they contract COVID-19. *Swain, et al. v. Junior, et al.*, Case No. 20-cv-21457 (S.D. Fla. Apr. 5, 2020). Two days later, on

April 7, the court issued a temporary restraining order requiring the jail to produce a list to the court of all medically-vulnerable inmates and to take numerous actions within the jail to come into compliance with public health recommendations, including social distancing. **Ex. 6**, p. 2. In granting this temporary relief, the judge did not hold a hearing and instead “accepted the allegations in the Complaint and its attachments as true without briefing or evidentiary submissions by the Defendants,” and noted “this Order does not make a finding of wrongdoing on the part of any defendant and no defendant has waived any defenses to this action.” *Id.*, at 5. With this temporary protection in place, the court set a briefing schedule for the preliminary injunction hearing now set for April 21. *Id.*

2. *New York v. Brann, et al.*, Index No. 451078/2020 (Sup. Ct, N.Y. County Apr. 6, 2020) – Exhibit 7

On April 6, 2020, the Supreme Court of New York County issued an order releasing eighteen medically vulnerable pretrial detainees held at Rikers Island, because their continued incarceration in the facility, which had a known COVID-19 outbreak, violated the Due Process Clause. **Ex. 7**. The court explained:

Covid-19 is at large at Rikers Island. The current epidemic poses a deadly threat to inmates, and its presence at the prison equates to an "unsafe, life-threatening condition" endangering "reasonable safety." *See Helling v. McKinney*, 509 US at 33, *supra*. Given such circumstances and the absence of a viable alternative, a court has no choice but to order release. *Brown v. Plata*, 563 US at 511, *supra*.

Id., at 4. Several of the individuals had been accused of serious, violent crimes, and the court found such accusations could not justify placing these individuals at “substantial risk of death or other serious physical injury.” *Id.*, at 9. The court also noted that, “it is critically important to remember that petitioners have been convicted of nothing. They instead face contested charges.” *Id.*, at 6.

In finding that the jail officials had failed to take “reasonable care” to mitigate the risk posed by COVID-19 to these medically vulnerable inmates, the court underscored that it “does not at all question the good faith of the Rikers officials.” *Id.*, at 7. Still, the court concluded that the magnitude of the risk required release:

Due process does not excuse prison officials who mean well, but have no effective way to protect inmates from potentially fatal epidemics. Again, prison officials are obliged to take “reasonable care” to mitigate the risk posed by Covid-19. That is so especially for prisoners who can fairly expect extremely serious consequences if they contract the disease. “Reasonable care” and “mitigation” obligations are not satisfied by tossing a bucket of water on a four-alarm house fire, or by placing a band-Aid on a compound bone fracture. Reasonable care to mitigate must include an effort to employ an *effective* ameliorative measure. As would be expected when the Department of Corrections' own doctors ask for release, the escalating numbers of the infected show that what Rikers has done is not remotely effective. Prisoners with dangerous conditions are dramatically at risk. For some of them, only release can offer protection.

Id., at 7-8.

The court took this emergency action without waiting for a comprehensive evidentiary hearing, recognizing that the current reality of the COVID-19 public health crisis requires courts to take protective action immediately, *before* such action risks being mooted out by serious illness or death:

These are not normal times. Courthouses are almost completely closed. Staffing is short — judges, court officers, court reporters, clerks, and IT employees. The ability of Rikers Island officials to arrange internet conferences with inmates is very limited. Medical records are not available. Expert medical witnesses are, to say the least, occupied. But the claims of these petitioners, and hundreds of other inmates who believe they are in immediate danger, deserve to be treated as emergency questions for courts and other officials who can grant release. Perhaps two months from now, when the disease has abated, the courtrooms will reopen, weeks can be spent marshaling evidence, and cross-examinations can be conducted. But there is no time to wait — the issues will be moot. The court's conclusions about inmate conditions had to be based on the records available to the parties, the lawyers' phone calls to busy experts, work on the internet, and Skype conversations held in the absence of affected petitioners.

Id., at 8-9.

3. ***U.S. v. Plunk***, Case No. 94-cr-0036 (D. Alaska Apr. 9, 2020) – **Exhibit 8**

On April 6, 2020, the Alaska federal district court ordered compassionate release of a federal prisoner who is older and suffers from serious underlying health conditions. “The Court finds that COVID-19 presents a clear and present danger for individuals who are in custody. If COVID-19 reaches Defendant’s custodial facility, his ability to follow recommended self-care and public health guidance is substantially diminished by the restrictions inherent to his environment.” **Ex. 8**, p. 8.

Dated: April 13, 2020

Respectfully submitted,

s/ Andy McNulty

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*In cooperation with the ACLU Foundation of
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Counsel for Plaintiffs Barnum and Lewis

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2020, I electronically filed the foregoing **PLAINTIFFS' NOTICE OF SUPPLEMENTAL EVIDENCE AND AUTHORITY IN SUPPORT OF PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF (ECF DOC. 1)** with the Clerk of the Court using the CM/ECF system which will send notification to the following counsel.

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/s/ Charlotte Bocquin Scull
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EXHIBIT 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No.:

THOMAS CARRANZA;
JESUS MARTINEZ;
RICHARD BARNUM;
THOMAS LEWIS;
MICHAEL WARD; and,
COLBY PROPPES,

Plaintiffs, on their own and on behalf of a class of similarly situated persons,

v.

STEVEN REAMS, Sheriff of Weld County, Colorado, in his official capacity,

Defendant.

DECLARATION OF CHERYL COOK

I, Cheryl Cook, declare the following based on my personal knowledge:

1. I am the executive director of Rock Found, a re-entry center in Greeley, Colorado that helps people coming out of prison find housing, jobs, and the community they need to build a meaningful life after incarceration.

2. A little over four years ago, I began working with Charles Peterson, who we called Charlie. He had spent almost twenty years in prison until he was granted parole and an opportunity to build a new life.

3. During the course of the past four years, Charlie took up residence and work at Rock Fund, and he became an important part of the Rock Fund family. I knew him personally and well, and I believe he was entirely committed to building and sustaining a worthwhile life after prison.

4. I am beyond sad that Charlie died of COVID-19 on Wednesday April 1, just two days after being released from the Weld County Jail.

5. Charlie had been in jail since March 11 on a parole hold. It was his first time behind bars in the 4 years since he'd been released. We at the Rock Fund had been doing all we could to get him out of jail and were preparing to testify on his behalf at his upcoming hearing on May 24. But on Friday March 27, I received a call saying that there was a plan to release Charlie if he could continue to stay at Rock Fund. Of course I said yes. On Monday May 30, we were told Charlie was ready for pickup. I asked his Rock Fund roommate to pick Charlie up at the Weld County Jail.

6. A little while later, I got a call from Charlie's roommate saying something was wrong with Charlie, that he could barely walk. Another of Charlie's roommates called to tell me Charlie is very sick, that he was cold and shivering. I called the paramedics and let them know that Charlie needed medical attention and had just been released from the Weld County Jail. I honestly could not believe that not a single person from the Weld County Jail had told anyone at Rock Fund that they were releasing a seriously sick person into our care, especially in the midst of the COVID-19 crisis.

7. Charlie was immediately admitted into the hospital. The next morning, on Tuesday March 31, the doctor called me and said that Charlie was gravely ill and wanted to know his end of life wishes. The next day, at around 11:30 a.m., Charlie died in the hospital.

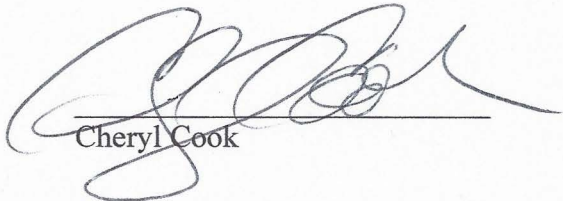
8. The doctor told me that they suspected Charlie had COVID-19 based on a lung scan, but that they did not yet have the results of the COVID-19 test. On Friday April 3, the doctor called me with the news that Mr. Peterson was positive for COVID-19. Charlies' two roommates at Rock Fund were immediately put under a quarantine order by Weld County.

9. I contacted Parole and let them know about Charlie dying and having COVID-19. They assured me they would contact the Weld County Jail. The Coroner's staff also informed my staff that the virus and death would be reported to Weld County Jail.

10. We at Rock Fund are mourning the loss of our friend, our family member, Charlie Peterson. We await the end of the COVID-19 crisis so that we can have an end of life celebration for a man that worked so hard to redeem himself and create a better life.

11. I am so angry that Mr. Peterson got COVID-19 in the jail and even angrier that he was released when he was on his death bed, without any notice to us that he was even sick. I read in April 1 Greeley Tribune that the first Weld County inmate tested positive for COVID-19. That individual was reported to be in the jail since sometime in 2018. So, I know that wasn't Charlie. There has been nothing else in the paper about any other inmates testing positive in the jail. How could Weld County Jail have failed to tell the public and inmates and judges about Charlie's positive test and his ultimate death by the virus? I fear for the health of other inmates in the Weld County Jail and the community to whom many will be released.

Executed this 10th day of April, 2020.



Cheryl Cook

EXHIBIT 2

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No.: 1:20-cv-00977-PAB-MEH

THOMAS CARRANZA, et al.

Plaintiffs, on their own and on behalf of a class of similarly situated persons,

v.

STEVEN REAMS, Sheriff of Weld County, Colorado, in his official capacity,

Defendant.

DECLARATION OF CHRISTOPHER VECCHIARELLI

I, Christoper Vecchiarelli, declare under penalty of perjury under the law of Colorado that the following is true and correct to the best of my knowledge and information:

1. My name is Christoper Vecchiarelli. I am over the age of twenty-one and am otherwise competent to testify. I make the following statements based upon my personal knowledge.

2. I was incarcerated in the Weld County Jail starting on February 20, 2020 and was released on April 7, 2020. I was charged with driving while intoxicated. I was scheduled to be transferred to the work release program in March of 2020. Because the work release program was shut down, I was not transferred and continued to be incarcerated until a few days ago.

3. While I was in the Weld County Jail, I saw firsthand the lack of response to the corona virus outbreak. Until April, the Weld County Jail did absolutely nothing to protect inmates from the spread of the corona virus. It was business as usual.

4. I learned about the corona virus outbreak from my wife. Even when there was reporting in the Greeley Tribune that there were cases of corona virus in the Weld County Jail, deputies denied that there were and told inmates that the corona virus was not in the jail.

5. In April, Weld County Jail instituted a twenty-three hour a day lockdown. Even with this lockdown, all inmates in a pod still intermingled within feet of each other during the one hour a day we were let out into the common areas of the pod. Additionally, all inmates shared common toilets, sinks, and showers.

6. In my pod, there were forty-two inmates. In my cell, even after the lockdown, there were eight inmates total in a ten foot by fifteen foot cell. It was impossible to maintain a distance of six feet from other inmates.

7. While in the Weld County Jail, I obtained trustee status. As a trustee, my job was to work in the kitchen. I helped prepare meals and distribute them to other inmates from 12 p.m. to 7 p.m. every day.

8. As a trustee, I observed the food “safety” practices in the Weld County Jail. In the kitchen, we were provided one hundred gloves per shift (of seven hours) for twenty inmates. That meant that each inmate received, essentially, two sets of gloves per shift. If we asked for more gloves, the guards would deny our request. This meant that, when we brought food from pod to pod, we had to use the same gloves. There were also times when I was preparing food that I was forced to expose my bare forearms to food. When I was tasked with mixing salad for all of the inmates, the guards provided me with an industrial sized bowl and no utensils to mix the salad. The guards told me to reach my arm, up to my forearm, to mix the salad.

9. Additionally, while working in the kitchen, I saw one trustee become severely ill and be forced to keep preparing food. That inmate had shortness of breath and vomiting for over a week, and he was forced to continue preparing food for all of the inmates in the jail. It was only after he passed out on the job on April 5, 2020, that he was allowed to stop working in the kitchen.

10. In fact, there were a number of inmates who were working in the kitchen with me, up until I left in April, that were sick and actively displaying symptoms of corona virus. They continued to prepare food.

11. As a trustee, I also observed the sanitation and hygiene practices in the jail. I saw that the hygiene practices did not change from before the outbreak. The shared toilets and sinks continued to be cleaned only once weekly, even in April after the lockdown. Even after the lockdown, inmates did not have access to hand sanitizes, lysoll wipes, or bleach. Trustees would use the same industrial cleaner that came out of the mop dispenser in the closet to clean other surfaces. Even after the lockdown, cells were not cleaned.

12. I also witnessed multiple guards tell anyone they saw with a mask to take it off. Masks were only provided to kitchen staff on April 6, 2020. Before that, inmates were preparing food without masks on.

13. When I was in the jail I saw many inmates displaying symptoms of corona virus. It seemed like a lot of inmates started getting sick in the beginning of March. Despite the fact that there were a large number of inmates who were sick, none of these inmates were quarantined. And, none of these inmates were tested for the virus.

14. The only thing that guards asked inmates to ascertain whether they had corona virus was whether they had hiccups. Multiple guards asked me this question every day and told me that hiccups were a telltale sign that someone had the corona virus.

15. I also started having symptoms of corona virus and was not tested. This included shortness of breath and coughing. I continued working in the kitchen until the day I was released. I am a vulnerable person for corona virus as I have damage to my lungs from multiple pulmonary embolisms. I am currently seeking treatment for my symptoms and testing for the virus.

A handwritten signature in black ink, appearing to read 'Chris Vecchiarelli', with a long horizontal stroke extending to the right.

Christopher Vecchiarelli

EXHIBIT 3

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No.: 1:20-cv-00977-PAB-MEH

THOMAS CARRANZA, et al.

Plaintiffs, on their own and on behalf of a class of similarly situated persons,

v.

STEVEN REAMS, Sheriff of Weld County, Colorado, in his official capacity,

Defendant.

DECLARATION OF RALPH BREWER

I, Ralph Brewer, declare under penalty of perjury under the law of Colorado that the following is true and correct to the best of my knowledge and information:

1. My name is Ralph Brewer. I am over the age of twenty-one and am otherwise competent to testify. I make the following statements based upon my personal knowledge.

2. I was incarcerated in the Weld County jail beginning on February 7, 2020 until I was released from my sentence ten days early, on April 3, 2020. During that time, I was serving a 90-day sentence.

3. At some point in early March, I was transferred to Larimer County jail for a hearing on another case. Upon return to Weld County jail, I was told by the guard in the intake pod that I would need to be placed in quarantine for 14 days due to my potential exposure to the virus while outside of the Weld County jail. The “quarantine” pod was the intake pod, also called the M pod.

4. I was told that being in quarantine meant that I would be in the cell with people who had come in on that same day or someone I had been housed with before. In other words, I would not be housed with new people.

5. In fact, my “quarantine” only lasted 5 days and during that time I was moved around to several different cells and housed with many people who I had never seen before, including, at one point, two guys who had come in straight from the street on a different day than me.

6. We had to do everything in our cells, including eat our meals. There was no soap in our cell for at least the first 2-3 days. We had to continuously ask for more hygiene products, including soap.

7. When my “quarantine” ended early, I was told it was because the intake pod was full, and they needed the space for new people.

8. I had previously applied to be a trustee so that I could earn “good time” and be released early. I had been approved for trustee status, so around March 23, 2020, I was moved directly from the quarantine pod (9 days early) to the pod that housed all the jail’s trustees, called the TM pod.

9. In the TM pod, the inmates had to clean the bathrooms, including sinks, showers and toilets, and all the surfaces in the shared day room. The bathroom and the day room were used by approximately 35 inmates. The only supplies we were given was a broom, a mop, a mop bucket and some kind of spray. When I asked for gloves to use while cleaning, I was told, “those are not available to the inmates.”

10. Upon becoming a trustee, I was immediately assigned to work in the kitchen. My shift was every day from 12:30-7:00. I prepped food, prepared food trays,

and washed dishes. The only protection we were provided were gloves and a beard net. I was never given a mask.

11. After about four or five days of working in the kitchen, I began to feel sick. I was tired all the time and would only get out of bed to go to work in the kitchen. I began to feel like I had bronchitis in my chest.

12. I was so nauseous all the time that I stopped eating most of my meals and would give my tray of food away to the other inmates.

13. When the nurses came around to distribute medications, I explained my symptoms and was given Tylenol twice a day and some cough medicine. The medical staff was always complaining about how many inmates were in the med line and how much work they had to do.

14. I told one nurse that I wanted to have my lungs checked because I was feeling so sick and I really did not think that I could go to work. She said that she would come back and check on me. She never returned.

15. I repeatedly told the guards that I did not think that I could go to work because I really needed to rest. I was told by more than one guard that if I was not running a fever then I needed to be in the kitchen because they were short staffed.

16. I submitted kites seeking medical attention and the response that I received was that I should, "drink more fluids."

17. That same week, while working in the kitchen, I told Jen, the Aramark employee who runs the kitchen, that I was feeling very sick and nauseous. She blew me off, saying, "well, if you throw up, just don't flush the toilet so we can see it."

18. During a walk-through, I told a guard that I really needed to see a nurse. The guard said that “if he had time” he would try to get a nurse to come check on me. I saw that guard later and complained again about not seeing a nurse. The guard said that he “forgot.”

19. Finally, on April 3, 2020, I saw the same guard and complained again that I still had not seen a nurse. I told him that I was really sick and upset and was going to file a grievance against medical if I did not get some help. The guard assured me that he would get someone to come check on me.

20. About two hours later, I was called out of the kitchen. I thought that I was finally going to see medical about my condition. Instead, I was told that I was being released ten days early.

21. My daughter picked me up from the jail and took me directly to urgent care. They told me that I have the symptoms of Covid-19 and prescribed me medication. They told me to quarantine myself for the next 14 days, which I am doing at my mother’s house in Fruita, Colorado.

22. Despite my efforts, I have not been able to obtain a test for the coronavirus.

s/ Ralph Brewer

Ralph Brewer

I, Sara R. Neel, certify that I reviewed this declaration with Ralph Brewer by phone on April 13, 2020 and that he certified that the declaration was true and correct to the best of his knowledge. I am unable to meet in-person with Mr. Brewer as he is currently quarantined in his mother's house in Fruita, Colorado. Mr. Brewer does not have access to a printer and scanner and because of his condition is not leaving the house.

A handwritten signature in cursive script that reads "Sara R. Neel".

Sara R. Neel, Senior Staff Attorney

EXHIBIT 4

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No.: 1:20-cv-00977-PAB-MEH

THOMAS CARRANZA, et al.

Plaintiffs, on their own and on behalf of a class of similarly situated persons,

v.

STEVEN REAMS, Sheriff of Weld County, Colorado, in his official capacity,

Defendant.

DECLARATION OF THOMAS LEWIS

I, Thomas Lewis, declare under penalty of perjury under the law of Colorado that the following is true and correct to the best of my knowledge and information:

1. My name is Thomas Lewis and I am a plaintiff in this case. I am over the age of twenty-one and am otherwise competent to testify. I make the following statements based upon my personal knowledge.

2. I have been incarcerated in the Weld County jail since January 3, 2020. I cannot afford to pay the bond that is set, so I will continue to be held in the Weld County jail until at least my next court appearance in late May 2020.

3. I am 60 years-old and have vitiligo, which is an immune deficiency disease. Both my age and my disease make me particularly vulnerable to suffering severe effects from Covid-19. I am very worried about contracting the disease in the jail because of the lack of precautions that have been taken by the jail and my inability to properly physically distance myself from other inmates and guards.

4. Since the beginning of my incarceration, I have been housed in cell number 11 inside Pod C. My cell is approximately 8 feet by 10 feet. I currently share my cell with two other inmates. One of the other inmates in my cell is Richard Barnum, another plaintiff in this case, who has Hepatitis C and kidney disease.

5. Weld County put the inmates on 23- and 1-hour lockdown beginning on April 1, 2020. Based on the size of the cell and the configuration of the desks and bunk beds, we cannot physically distance ourselves six feet away from each other while in the cell. Therefore, for 23 hours per day, I am unable to practice the CDC recommended physical distancing. I am on the bottom bunk and at least one other inmate is on the bunk right above me, about 1-2 feet away.

6. Medical staff comes around twice a day. Each time I obtain Tylenol from the medical staff for headaches.

7. Neither Weld County jail staff nor medical staff has ever asked me about whether I have underlying medical conditions that put me at a higher risk for serious illness for COVID-19.

8. Despite being 60 years-old and of higher risk to the disease, the only time that I have had my temperature taken is when I affirmatively requested it because I was developing a cough and was scared I had contracted the virus. The medical staff never followed up with me to see if I was ok or if my symptoms got any worse. Medical staff has only offered to take my temperature one other time, which was around approximately April 1, 2020.

9. Since the lockdown started on April 1, 2020, we have been required to eat all our meals in our cell. At mealtime, two inmates sit at the desks in our cell and one sits

on their bunk. The inmates who are sitting at the desks eating are essentially sitting shoulder to shoulder with the inmate on the bunk.

10. In Pod C, where I am housed, we share the bathrooms with about 50 other inmates. If I want to use cleaner when I go to the bathroom, I have to ask the deputy at the desk for the bottle of cleaner and check it out by providing the deputy with my inmate ID card which the deputy then returns to me when I bring back the bottle of cleaner.

11. I have never been encouraged by any guards to wipe down or clean the toilet or other bathroom surfaces before or after I use them. I don't see other inmates regularly wiping down surfaces in the bathrooms. In fact, inmates from different cells are often in there for 5-10 minutes talking with each other in close proximity.

12. When I use the phone in the day room, I almost never see other inmates cleaning it after they use it.

s/ Thomas Lewis

Thomas Lewis

I, Sara R. Neel, certify that I reviewed this declaration with Thomas Lewis by phone on April 13, 2020 and that he certified that the declaration was true and correct to the best of his knowledge. I am unable to meet in-person with Mr. Lewis as he is currently incarcerated in the Weld County jail and I am subject to Governor Polis's Executive Order restricting public travel and requiring physical distancing.

Sara R. Neel

Sara R. Neel, Senior Staff Attorney

EXHIBIT 5

**... IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No.: 1:20-cv-00977-PAB-MEH

THOMAS CARRANZA, et al.

Plaintiffs, on their own and on behalf of a class of similarly situated persons,

v.

STEVEN REAMS, Sheriff of Weld County, Colorado, in his official capacity,

Defendant.

DECLARATION OF HELEN GRIFFITHS

I, Helen Griffiths, declare under penalty of perjury under the law of Colorado that the following is true and correct to the best of my knowledge and information:

1. My name is Helen Griffiths. I am over the age of twenty-one and am otherwise competent to testify. I make the following statements based upon my personal knowledge.

2. I am employed as Public Policy Associate at the American Civil Liberties Union of Colorado (ACLU). As part of my job, I sometimes assist in case investigations for the ACLU's legal department under the supervision of an ACLU attorney.

3. On April 10, 2020, I worked under the supervision of ACLU attorney, Sara Neel, to assist in investigating facts related to this litigation. In that capacity, I conducted telephone interviews of six inmates incarcerated in the Weld County jail and asked them about conditions in the jail as of April 10.

4. In the remainder of this declaration, unless I indicate otherwise, I summarize the portions of those six conversations that were consistent between three or more of the inmates with whom who I talked.

5. All interviewed inmates said adequate physical distancing in the current conditions of the jail was impossible. Several inmates stated that the only way for feasible physical distancing would require single occupancy cells.

6. In the average cell, there are three to four inmates, and bunk beds are three beds high. The beds are only a few feet from each other. The Weld County jail currently does not assign inmates to sleep on the top bunk. Inmates sleep on the bottom two bunks, only a few feet away from inmates sleeping on the bottom beds of a neighboring bunk. Due to the 23-hour per day lockdown, the three to four inmates in the cell live, sleep and eat within a few feet of each other.

7. In some cells, there are healthy people and sick people bunking right next to each other.

8. New inmates are moving into general population after only a 5- to 8-day quarantine period.

9. There is no room for social distancing in the bathrooms. From one sink to another, there is less than a foot. The urinals are right next to each other. There are four toilets and four urinals for an entire pod of 40 or more people to use. There are no accommodations made for physical distancing in the bathroom.

10. Physical distancing is often not possible even when outside the cell. That is the time when inmates can use the phone, which has them sitting shoulder-to-shoulder. While out in the common spaces, inmates line up to receive meals and medication. While in those lines, 8-12 inmates stand right next to each other. When serving themselves drinks, the inmates do not have gloves. They all touch the same juice container and pour it into the same cup to measure the amount of drink they are allowed.

11. There is limited and irregular cleaning in the jail. The toilets and sinks are generally not disinfected between use. Several inmates referenced objects such as the hot water dispenser button and kiosk that are regularly touched but rarely, if ever, cleaned between uses.

12. The Weld County jail has made it difficult for inmates to practice proper hygiene. In order to wash their hands, inmates must be allowed out of their cells to use the bathroom. There are no hygiene options in many of the cells.

13. While inmates did receive masks very recently, they were told the mask they were given is the only mask they are allowed. They are only allowed to do laundry once a week.

14. The Weld County jail staff has not sought to determine whether inmates have underlying medical conditions that make them a higher risk for serious illness or death for COVID-19. The staff is not interviewing inmates to determine who is high risk. The staff are not taking any special precautions to protect people who are older or have underlying health conditions from getting the virus. Medically vulnerable people are treated just the same as every other inmate.

15. Some inmates are not having their temperature taken daily and are not being asked if they have COVID-19 symptoms. Instead, some guards ask inmates to come forward if they think they have symptoms. Inmates are told that if they feel sick, they should fill out a kite and wait for “med line” so that a nurse can take their temperature.

16. Inmates have not been informed of the number of cases of COVID-19 there are in the Weld County jail. Inmates are required to ask guards and to rely on second-hand information.

17. Inmates are concerned that guards do not take the threat of COVID-19 seriously. The guards often congregate to talk and do not practice proper physical distancing. During cell inspections, inmates say only some guards wear gloves and they do not change gloves between rooms. Guards spent weeks dismissing potential COVID-19 symptoms of guards and inmates, and claiming it was just a typical cold circulating throughout the jail.

18. The conditions in the Weld County jail exacerbate the potential spread of COVID-19. At least three inmates expressed with utter certainty that, “If nothing is done, someone will die in here.”

Signed this day April 13, 2020



Helen Griffiths

EXHIBIT 6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No.: 1:20-cv-21457-KMW

ANTHONY SWAIN, et al.,
Plaintiffs,

v.

DANIEL JUNIOR, et al.,
Defendants.

**ORDER GRANTING IN PART PLAINTIFFS' EMERGENCY MOTION FOR A
TEMPORARY RESTRAINING ORDER**

THIS MATTER is before the Court on Plaintiffs' Motion for Temporary Restraining Order (DE 3). Defendants oppose the motion. To obtain either a temporary injunction or a preliminary injunction, a party must demonstrate that: "(1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1247 (11th Cir. 2016). Based on the Court's review of the record, relevant case law, and the Parties' representations during the telephonic status conferences held April 6, 2020 and April 7, 2020, Plaintiffs have met that standard.

Accordingly, after consultation with the Parties, and for the reasons cited at the telephonic status conferences held April 6, 2020 and April 7, 2020 with all Parties present, it is **ORDERED and ADJUDGED** that Plaintiffs' Motion for Temporary Restraining Order (DE 3) is **GRANTED IN PART** as follows:

1. It is **ORDERED** that by **April 9, 2020**, Defendants shall file under seal a list of all individuals who are currently detained at Metro West Detention Facility and who meet any of the criteria in paragraph three. This list shall be filed under seal to protect the confidential health information of those individuals and shall remain under seal pending further order by this Court.

2. It is further **ORDERED** that by **April 9, 2020**, Defendants shall file a notice describing the particular measures being employed to protect these individuals from the risk of COVID-19.¹

3. The list of individuals shall include all of those currently detained at Metro West Detention Facility who meet any of the following criteria:

- Are 60 years of age or older;
- Have chronic respiratory disease, including lung disease, moderate to severe asthma, or chronic obstructive pulmonary disease (e.g. bronchitis or emphysema);
- Have heart disease, such as congenital heart disease, congestive heart failure, or coronary artery disease;
- Have chronic liver or kidney disease (including hepatitis and conditions requiring dialysis);
- Have diabetes;
- Have epilepsy;
- Have diagnosed hypertension;

¹ One of the lists required under Paragraph 1 or 2 shall be filed with the Court by **6:00 PM on April 9, 2020** and the other shall be filed by **midnight on April 9, 2020**.

- Have a compromised immune system (such as from cancer, HIV, receipt of an organ or bone marrow transplant, as a side effect of medication, or other autoimmune disease);
- Have sickle cell disease; and/or
- Are or have been pregnant within the last two weeks.

4. It is further **ORDERED** that Defendants shall take the following actions at the Metro West Detention Center:

- Effectively communicate to all people incarcerated at Metro West Detention Center, including low-literacy and non-English-speaking people, sufficient information about COVID-19, measures taken to reduce the risk of transmission, and any changes in policies or practices to reasonably ensure that individuals are able to take precautions to prevent infection;
- To the maximum extent possible considering Metro West Detention Center's current population level, provide adequate spacing of six feet or more between people incarcerated at Metro West so that social distancing can be accomplished;
- Ensure that each incarcerated person receives, free of charge: (1) an individual supply of soap, preferably liquid as recommended by the CDC, sufficient to allow frequent hand washing each day, (2) hand drying machines, or disposable paper towels as recommended by the CDC, and individual towels, sufficient for daily use (3) an adequate supply of disinfectant products effective against the virus that causes COVID-19 for daily cleanings; and (4) an adequate supply of toilet paper sufficient for daily

use;

- Provide reasonable access to showers and to clean laundry;
- Require that all MDCR staff wear personal protective equipment, including masks, and gloves when physically interacting with any person and require that, absent extraordinary or unusual circumstances, a new pair of gloves is worn each time MDCR staff touch a different person; and require all inmate workers who are cleaning facilities or preparing food to follow this same protocol;
- Require that all MDCR staff regularly wash their hands with soap and water or use hand sanitizer containing at least 60% alcohol;
- Ensure access to proper testing for anyone displaying known symptoms of COVID-19 in accordance with CDC guidelines;
- Ensure that individuals identified as having COVID-19 or having been exposed to COVID-19 receive adequate medical care and are properly quarantined, with continued access to showers, mental health services, phone calling with family, and communications with counsel; individuals identified as having COVID-19 or having been exposed to COVID-19 shall not be placed in cells normally used for disciplinary confinement absent emergency circumstances;
- Respond to all emergency (as defined by the medical community) requests for medical attention as soon as possible;
- Provide sufficient disinfecting supplies consistent with CDC recommendations in each housing unit, free of charge, so incarcerated

people can clean high-touch areas or any other items in the unit between each use;

- Waive all medical co-pays for those experiencing COVID-19-related symptoms; and
- Waive all charges for medical grievances during this health crisis.

5. This Temporary Order is valid for a limited period of 14 days or until further order of this Court, or until Defendants demonstrate that they have substantially complied with this Order. The Court's ruling is subject to change based on a more fully developed record at preliminary injunction proceedings.

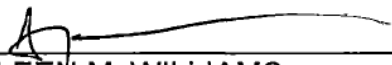
6. For purposes of this Order, the Court accepted the allegations in the Complaint and its attachments as true without briefing or evidentiary submissions by Defendants; this Order does not make a finding of wrongdoing on the part of any defendant and no defendant has waived any defenses to this action.

7. If Defendants have not yet been served in accordance with Federal Rule of Civil Procedure 4, Plaintiffs shall immediately provide a copy of this Order to Defendants.

8. A telephonic hearing on Plaintiff's Emergency Motion (DE 3) for Preliminary Injunction is **SET** for **April 21, 2020 at 1:00 PM**.

9. Defendants shall file a response (not exceeding 35 pages) to Plaintiff's Emergency Motion (DE 3) by **April 16, 2020 at 5:00 p.m.** Defendants need not file responses to any other pleading or motions until further order of the Court. Plaintiffs may file a reply by **April 20, 2020 at 12:00 p.m.**

DONE AND ORDERED in chambers in Miami, Florida, this 7th day of April, 2020.



KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE

EXHIBIT 7

Supreme Court, New York County

**PEOPLE OF THE STATE OF NEW YORK EX REL.
COREY STOUGHTON, ESQ., on behalf of**

**HOGAN JEFFREY, REGINALD JONES, MICHAEL
COUCHON, SEKOU KANE, NELSON CORPORAN,
JOSEPH BRYANT, CLAYTON BARRY, DOMINICK
WILLIAMS, UCEFF WADE, CECILIA HOWARD,
BRANDI FELCI, MARJORIE CHAMBERS, ALUDIEN
MARKS, BRIGHTON MONTGOMERY, NICHOLAS
KILGORE, JONATHAN PEREZ, EVA DOUBLERG,
KEITH JOHNSON, JASON BORRERO, PEDRO
VINCENT BARCIA, ABDULLAH SPENCEREL,
SERGIO BRUNO, DARLY BRITT, MALCOLM
DAWSON, BRIAN KING, ALLEN NANCE,
CHRISTOPHER ANDRETTA, HERBERT BARRON,
JOHN PIVETZ, GLEN SNYDER, SAMUEL SAEZ, and
TOLIB AKILOV, Petitioners,
against
CYNTHIA BRANN, Commissioner, New York City
Department of Correction; and ANTHONY ANNUCCI,
Acting Commissioner, New York State Department of
Corrections and Community Supervision, Respondents.**

Index No. 451078/2020

For Petitioners:

Lauren Gottesman, Esq. Mary Lynne Werlwas, Esq.

The Legal Aid Society

Robert Briere, Esq.

for Petitioner Nicholas Kilgore

For Respondents:

Martin Bowe, Esq.

New York City Law Department

for Respondent Cynthia Brann
James Cooney, Esq.

New York State Department of Law

for Respondent Anthony Annucci
Patricia Bailey, Esq.

New York County District Attorney's Office

for Respondents

Mark Dwyer, J.

Petitioners, 32 inmates at the Rikers Island prison, have demanded release on due process grounds. Each petitioner faces one or more charges in New York County. Many are also incarcerated pending hearings on alleged parole violations. Their complaint concerns the Covid-19 pandemic. Petitioners contend that they are particularly vulnerable to serious injury and death should they contract the disease. And they assert that prisoners at Rikers are dangerously likely to contract it, to the point that continued confinement there violates their due process rights under the federal and state constitutions.

The only relief sought is release. The court will grant release, sometimes with conditions, to a fair number of petitioners. This opinion explains why. But this opinion will not do two other things. It will not describe the nature of the Covid-19 pandemic, as it is far too [*2]familiar to New Yorkers already. And it will deal with the circumstances of individual petitioners only briefly, as examples to explain particular points.

A

The health of prison inmates is the business of governments who incarcerate them. Indeed, it has long been settled that the United States Constitution requires the government to provide

effective medical care for inmates. *Brown v. Plata*, 563 US 493, 508-09 (2011); *Farmer v. Brennan*, 511 US 825, 832-33 (1994); *Estelle v. Gamble*, 429 US 97 (1976). These decisions involved convicted prisoners, and were decided under the Eighth Amendment. But the Due Process protections of the 5th and 14th Amendments and of the New York Constitution provide comparable protection to pretrial inmates. See, e.g., *Kingsley v. Hendrickson*, 576 US ____ (2015); *Cooper v. Marin*, 49 NY2d 69 (1979). That makes sense, as it could not be thought that pretrial detainees should enjoy less protection than convicted inmates. Contemporary law as to the rights of all prisoners simply "codif[ies] the commonlaw view that 'it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.'" *Estelle v. Gamble*, 429 US at 103-04, *supra*.

To invoke the federal due process clause successfully, a petitioner may establish that the government's actions impose a serious, medically threatening condition on prisoners. Alternatively, and to the point here, the petitioner may show that the government failed to act "with reasonable care" to mitigate a risk created by a seriously threatening prison condition, even though the responsible authorities knew or should have known that the condition posed an excessive risk to the health or safety of the inmates. *Helling v. McKinney*, 509 US 25, 331-32 (1993). The cases differ on precisely how to interpret the mens rea requirement, and in particular on whether the prison officials must be aware of the danger. Compare *Darnell v. Pineiro*, 849 F3d 17 (2nd Cir 2017) with *Caiozzo v. Koreman*, 581 F3d 63 (2nd Cir 2009). But the issue is moot here. There is no doubt that Rikers officials are aware of the Covid-19 threat. The New York due process test is simpler. A court weighs the benefit sought by the government from a condition against the harm that the condition imposes on inmates. *Cooper v. Morin*, 49 NY2d at 79, *supra*.

If the government cannot satisfy the due process requirement, the court must accord a remedy — including, where appropriate, release from prison. *Brown v. Plata*, 563 US at 511, *supra*. Courts "must not shrink from their obligation to 'enforce the constitutional rights of all , including prisoners.'" Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration." *Id.* (citation

omitted). Notably, *Brown* itself approved an order requiring the release of numerous convicted California prisoners unless the state quickly relieved long-standing prison overcrowding that, *inter alia*, threatened the health of the inmates.

There can be no doubt that the presence of a communicable disease in a prison can constitute a serious, medically threatening condition. The point need not be belabored in this case. Covid-19 is at large at Rikers Island. The current epidemic poses a deadly threat to inmates, and its presence at the prison equates to an "unsafe, life-threatening condition" endangering "reasonable safety." *See Helling v. McKinney*, 509 US at 33, *supra*. Given such circumstances and the absence of a viable alternative, a court has no choice but to order release. *Brown v. Plata*, 563 US at 511, *supra*.

Respondents do not deny that much. They assert, however, that Corrections officials at Rikers Island have not been "deliberately indifferent" to the danger. To the contrary, they maintain, officials at Rikers have sought diligently to prevent the spread of the Covid-19 disease among the inmates. They assert that they have provided soap and cleaning supplies that allow petitioners and their fellow prisoners to protect themselves from the virus. They also urge the inmates to engage in "social distancing," *i.e.*, to maintain a distance of six feet between themselves and other inmates. Some inmates have been released with the consent of the District Attorney. Thus, respondents assert, they have satisfied the constitutional mandate by taking "reasonable care" to mitigate the risk of the disease. It follows, they continue, that no due process violation has occurred, and no remedy is due petitioners.

B

This court disagrees. A look at the conditions at Rikers Island explains why.

First, communicable diseases could not ask for a better breeding ground than a crowded prison. Rikers facilities are crowded. Prisoners eat in communal dining rooms. Cooking is done by inmates and the food is dished out by inmates. Entertainment is found in common rooms.

Many detainees reside in barracks-style dormitories. Many have a neighbor who sleeps less than six feet to the side. The inmates share sinks, showers, and toilets. Much of the space is so cramped that the inmates are physically unable to stay far enough from their fellow prisoners to be safe from the risk of contagion. Moreover, for many prisoners, a natural concomitant of confinement is a desire to associate in groups with one another. They communicate face-to-face, without the luxury of Skype or twitter. And, as elsewhere, even individuals without apparent Covid-19 symptoms can spread disease in all these areas and situations.

Beyond that, inmates in a local urban jail like Rikers are constantly exposed to additional potential sources of contagion. Arrests do not stop for a plague. New inmates arrive daily from around New York City. Every day, members of the prison staff commute to the prison from their homes in the city and its nearby suburbs. Until the epidemic hit this city, on five days a week inmates were taken in crowded and unsanitary buses to crowded and unsanitary courthouse holding pens.

Second, these conditions have produced the results one might expect. Diagnoses of the disease are "spiking" at Rikers — exponentially. As of March 20 it had reported that one case of the disease had been diagnosed at the prison. On March 21, 21 inmates and 17 members of the staff were reported ill from the virus, and one member of the staff was dead. By March 24, the day the petition was filed, there were a reported 39 cases. By April 1, 184 prisoners and 179 members of the staff were ill. As this opinion is being issued, the most recent report is that on April 2 there were 231 sick prisoners, in addition to 223 sick staff members. The rate of increase is about 5 times higher than that of New York City in general — and the rate in New York City, the national "epicenter" of Covid-19, has dramatically exceeded that of the rest of the country.

The New York City Board of Correction, established by the City Charter, is an independent oversight board charged with regulating, monitoring, and inspecting the city's correctional facilities. On March 21 the Board issued an advisory letter to judges and prosecutors calling for the release of prisoners over 50 years old who have conditions placing [*3]them at high risk if they contract Covid-19. Many of the petitioners are among those at risk. The Board's plea has since been joined by Ross MacDonald, the Chief Medical Officer of the Correctional Health

Services, and Rachel Bernard, a geriatrician at Rikers. For whatever it might be worth, the press reports that inmates feel helpless, with some suggesting that they are facing a "death sentence." And it is critically important to remember that petitioners have been convicted of nothing. They instead face contested charges.

Under the best of circumstances, there are far better places to be than Rikers Island. And these are not the best of circumstances.

C

Before the law is applied to the facts of this case, one final point should be made. The experts agree on the best practices to avoid the Covid-19 virus — frequent hand-washing, covering coughs and sneezes, social distancing, and so on. They also agree on this critical factor: the individuals who catch the disease face differing consequences. It was originally thought that the young rarely were in serious danger from the disease. That conclusion is now subject to serious doubt. But the experts agree that certain pre-existing conditions are aggravators.

Age is among them. Different estimates are given — age 50, 60, 65, 70 — as to when the calendar presents a special threat of harm from the virus. The current CDC number is 65. The different estimates are natural enough. Unlike the law, nature and its diseases do not respect a bright line crossed on a particular birthday. But it is agreed that infected individuals of a relatively advanced age are likely to suffer more than the young.

Age is not often thought of as a disease. The other conditions classified as aggravators are. Covid-19 attacks the respiratory system. Accordingly, pre-existing respiratory inhibitors like serious asthma or chronic lung disease can complicate a patient's Covid-19 symptoms. Combating the virus is a task for the immune system, and those afflicted with HIV or another condition that weakens the immune system can be at special risk. Covid-19 puts a strain on the heart, and therefore serious heart conditions can expose an individual to extra danger. Diabetics and those afflicted with some other diseases may have issues on more than one of these fronts.

Petitioners do not argue that it violates due process to hold at Rikers a young prisoner who has no aggravating conditions. Instead, each contends that, while infection at Rikers is quite likely for all inmates, for those with aggravators the danger after Covid-19 strikes is much greater than the danger facing their fellows. Each petitioner claims to have one or more aggravating conditions. And each concludes that holding him or her at Rikers, where the prospect of Covid-19 infection is so great, must be deemed a violation of his or her rights.

D

The stage is set for consideration of how due process principles apply here. Respondents assert that they have taken "reasonable care" to mitigate the risk posed by Covid-19, and thus have satisfied the due process mandate. This court disagrees.

This judge does not at all question the good faith of the Rikers officials. Certainly no [*4] American prison is equipped to deal with a health crisis of the severity of this one. Rikers has medical facilities, but it is not a hospital — and this epidemic is a fierce challenge even for our hospitals. A crowded prison, for example, has no ability to quarantine the large number of prisoners exposed to inmates who eventually display symptoms. Indeed, in this case that would essentially mean a quarantine of everyone at the prison, inmates and staff. There certainly are not the necessary kits to administer tests for the disease to all inmates, much less the repeated tests required to assess their condition at subsequent times. And the ability to allow adequate distance to be maintained among detainees and staff is decisively precluded by the nature of prison construction and operation — as noted, for example, barracks-like sleeping quarters and communal dining. Even hand sanitizer, now a staple tool for preventing spread of the disease, cannot be employed: its alcohol content makes it contraband, a danger to prisoners who might drink it and to guards who, because the alcohol content is high, fear that it can be used as a weapon.

Due process does not excuse prison officials who mean well, but have no effective way to protect inmates from potentially fatal epidemics. Again, prison officials are obliged to take

"reasonable care" to mitigate the risk posed by Covid-19. That is so especially for prisoners who can fairly expect extremely serious consequences if they contract the disease. "Reasonable care" and "mitigation" obligations are not satisfied by tossing a bucket of water on a four-alarm house fire, or by placing a band-Aid on a compound bone fracture. Reasonable care to mitigate must include an effort to employ an *effective* ameliorative measure. As would be expected when the Department of Corrections' own doctors ask for release, the escalating numbers of the infected show that what Rikers has done is not remotely effective. Prisoners with dangerous conditions are dramatically at risk. For some of them, only release can offer protection.

At this point, the court has ruled that 18 petitioners are in this category. (A few other petitioners have been released on consent or on bail). All 18 are afflicted with conditions acknowledged to endanger them: heart disease, serious respiratory conditions, cancer, diabetes, uncontrolled HIV, and so forth. For some of them, the condition or conditions are more dangerous because those prisoners are relatively old. Those 18 petitioners have been ordered released.

For others, the petition has been denied. Some of the inmates are between 50 and 60 years old, and have nothing beyond that to suggest that they are in more danger than the average inmate. This judge does not believe that to be sufficient to justify release. One petitioner also has glaucoma; that ocular condition is not reported to complicate Covid-19. One has HIV, but the condition is well controlled. The petitioner's viral count is easily low enough, and the T-cell count high enough, to take the condition out of the category of an enhanced threat. One petitioner was convincingly shown by his medical history to be a malingerer, in no special danger at all.

These are not normal times. Courthouses are almost completely closed. Staffing is short — judges, court officers, court reporters, clerks, and IT employees. The ability of Rikers Island officials to arrange internet conferences with inmates is very limited. Medical records are not available. Expert medical witnesses are, to say the least, occupied. But the claims of these petitioners, and hundreds of other inmates who believe they are in immediate danger, deserve to [*5] be treated as emergency questions for courts and other officials who can grant release. Perhaps two months from now, when the disease has abated, the courtrooms will reopen, weeks

can be spent marshaling evidence, and cross-examinations can be conducted. But there is no time to wait — the issues will be moot. The court's conclusions about inmate conditions had to be based on the records available to the parties, the lawyers' phone calls to busy experts, work on the internet, and Skype conversations held in the absence of affected petitioners.

Three final notes should be made. First, for a court to order a release of prisoners on account of a due process violation is "a matter of undoubted, grave concern." *Brown v. Plata*, 563 US at 501, *supra*. Still, this judge does not believe that release can be denied even to those charged with violent crimes if they are at substantial risk of death or other serious physical injury. Such inmates have the same due process rights as others. They may be treated differently from others, even in a pretrial context. Some can be shackled. Some can be subjected to unusual intrusions on privacy. Some can be isolated from other inmates. Even under New York law, some charges justify assessments of dangerousness that can lead to higher bail or remand. But these prisoners cannot be punished with the unnecessary exposure to a highly communicable, and for them a potentially deadly, disease. Thus, one of the inmates ordered released is a man who is over 60, suffers from very serious heart conditions, has a chronic obstructive pulmonary condition as well as asthma, is diabetic — and is charged with a vicious murder.

Second, and relatedly, what has been ordered for petitioners is temporary release. No charges are being dismissed. The inmates facing criminal charges will still face those charges. The inmates on parole will remain on parole, and the relevant parole violation allegations can be pursued. Moreover, the court has agreed with restrictions on release suggested by the government. For example, for some petitioners home confinement except for visits to mental health services has been directed. The petitioners cannot legitimately complain; at least they will not be confined on Rikers Island.

Finally, the petition sought relief only on the ground that the petitioners are in special danger if they become infected. Nothing in this opinion necessarily applies to how inmates without such conditions should be treated.

ENTER:

Dated: New York, New York

April 6, 2020

Mark Dwyer, J.

Appearances of Counsel:

[Return to Decision List](#)

EXHIBIT 8

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

v.

GERALD FRANK PLUNK,

Defendant.

Case No. 3:94-cr-00036-TMB

ORDER ON DEFENDANT’S MOTION
FOR REDUCTION OF SENTENCE AND
COMPASSIONATE RELEASE
[DKT. 711]

I. INTRODUCTION

The matter comes before the Court on Defendant Gerald Frank Plunk’s Motion for Reduction of Sentence to Time Served and Compassionate Release from Prison Under 18 U.S.C. § 3582(c)(1)(A)(i)(ii) (the “Motion”).¹ The Government filed an Unopposed Motion for Stay in response and requested a telephonic status conference.² The Motion for Stay was granted and a telephonic status conference set for April 9, 2020.³ Before the status conference, the Government filed a Response to Motion for Sentence Reduction-Conditional Non-Opposition (“Response”).⁴ Now, having held the status conference and lifted the stay, the Motion is ripe for resolution. For the reasons discussed below, the Motion is **GRANTED**.

¹ Dkt. 711 (Motion).

² Dkt. 724 (Motion).

³ Dkt. 726 (Text Order).

⁴ Dkt. 727 (Response).

II. BACKGROUND

Defendant has been in federal custody since his voluntary surrender on March 25, 1994.⁵ He was tried and found guilty of one count of Conspiracy to Distribute Cocaine in violation of 21 U.S.C. § 841(a)(1) and 846, four counts of Use of a Communications Facility in violation of 21 U.S.C. § 843(b), and one count of Possession of Cocaine with Intent to Distribute in violation of 21 U.S.C. § 841(a)(1).⁶ On November 18, 1996, Judge John W. Sedwick sentenced Defendant to two concurrent life terms under the then-mandatory sentencing guidelines.⁷

On September 4, 2019, Defendant filed “Defendant’s Pro Se Motion for Reduction of Sentence and Release from Prison Under 18 U.S.C. § 3582(c)(1)(A)(i)” (“Pro Se Motion”).⁸ Defendant signed the Pro Se Motion under “Pro Se Representation” and reaffirmed his alleged pro se status in the attached Certification of Service.⁹ On September 6, 2019, defense counsel filed “Counsel’s Notice of Joinder to Motion to Reduce Sentence (Dkt 703),” in which Attorney Weidner notifies the Court that he represents Defendant and joins in Defendant’s Motion for Release.¹⁰ The Court explained that Defendant cannot file on his own behalf while he is represented by counsel and denied the Pro Se Motion without prejudice.¹¹ Defendant, through counsel, did not refile any motion seeking to reduce his sentence until the present Motion.

⁵ *Id.* at 9.

⁶ *Id.* at 9–10.

⁷ *Id.* at 10.

⁸ Dkt. 703 (Motion).

⁹ *Id.* at 9, 11.

¹⁰ Dkt. 704 (Notice of Joinder).

¹¹ Dkt. 709 (Order).

On April 1 2020, Defendant filed the Motion requesting the Court reduce his sentence to time served and granting compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) and (ii).¹² Defendant argues for release based on both “extraordinary and compelling reasons” and “his age, medical condition and length of incarceration . . . as well as the dangers he now faces as an inmate . . . due to the ongoing national COVID-19 Pandemic and [his] status as a ‘potential high risk victim’ given his advanced age and medical condition.”

The Government initially responded by filing a Motion for Stay.¹³ The Motion for Stay explains that the parties are “discussing the merits of the substantive motions and have been attempting to arrive at a mutually satisfactory resolution.”¹⁴ The Government further represents that “[t]his matter is currently before the Deputy Attorney General for consideration” and that “[w]ithin the Department of Justice, the United States Attorney, District of Alaska, does not have final authority, without designation or authorization to settle the pending matter.”¹⁵ The Government then filed the Response, which states that the Government has considered the merits of the Motion and concludes that it does not oppose Defendant’s release on certain conditions.¹⁶

On April 9, 2020, at the joint request of the Parties, the Court held a telephonic status conference. During the conference, the Parties explained that they had reached an amicable resolution and jointly recommended release. Furthermore, the Court made oral rulings from the bench denying Defendant’s Request for Assignment to Judge John W. Sedwick and/or Voluntary

¹² Dkt. 711 at 1.

¹³ Dkt. 724.

¹⁴ *Id.* at 2.

¹⁵ *Id.*

¹⁶ Dkt. 727 at 3–4.

Recusal of Judge Timothy M. Burgess and lifting the stay that was previously granted on the Government's Unopposed Motion for Stay.¹⁷

III. LEGAL STANDARD

The First Step Act amended 18 U.S.C. § 3582(c)(1)(A) to allow a defendant to move the district court for compassionate release after exhausting the Bureau of Prisons' administrative process.¹⁸ Then, after considering the applicable factors set forth in § 3553(a), the court may grant the motion if it finds that:

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

IV. ANALYSIS

Even though Defendant moves for release under both prongs of 18 U.S.C. § 3582(c)(1)(A), the Court finds that the extraordinary and compelling reasons of the first prong suffice to grant Defendant's Motion and so limits the following analysis solely to that basis.¹⁹

¹⁷ See Dkts. 715 (Request); 724; 726.

¹⁸ See Pub. L. 115-391, 132 Stat. 5194, 5239 (2018);

¹⁹ Defendant has not actually served "at least 30 years in prison" to qualify for release under the second prong, § 3582(c)(1)(A)(ii). Nonetheless, Defendant does meet the age and custodial length considered to be extraordinary and compelling reasons for release under § 3582(c)(1)(A)(i) and U.S. Sentencing Guidelines Manual § 1B1.13.

A. Exhaustion of the Bureau of Prisons' Administrative Process

Section 3582(c)(1)(A) confers jurisdiction over compassionate release motions to the district court after the defendant exhausts the BOP's administrative process. "Exhaustion occurs when the BOP denies a defendant's application or lets thirty days pass without responding to it."²⁰ Here, Defendant has previously submitted two written requests for compassionate release to his wardens.²¹ His most recent request was submitted to the warden on January 14, 2019.²² More than 30 days have passed since receipt of that request and so this Court has jurisdiction to hear this Motion.

B. The 18 U.S.C. § 3553(a) Factors

The sentencing factors listed under § 3553(a) help the court impose a sentence that is

"sufficient, but not greater than necessary . . . (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, and other correctional treatment in the most effective manner."

In this case, reducing Defendant's sentence to time-served to effectuate an immediate compassionate release fulfills the § 3553(a) considerations. Defendant has been in prison for over 26 years. The Court recognizes the seriousness of his drug trafficking offenses and his history and characteristics at the time of sentencing. However, the nature and circumstances of the offenses were non-violent and his criminal history was significantly less serious than the criminal history

²⁰ *United States v. Mondaca*, Case No.: 89-CR-0655 DMS, 2020 WL 1029024, at *2 (S.D. Cal. Mar. 3, 2020) (internal quotations omitted).

²¹ See Dkts. 711-1 (Request); 711-5 (Request).

²² Dkt. 711-1 at 3.

category may have suggested.²³ Furthermore, Defendant was sentenced by Judge Sedwick at a time when the sentencing guidelines were mandatory. In 2015, when Defendant had served approximately 21 years of his sentence, Judge Sedwick wrote to President Obama to support Defendant's commutation petition.²⁴ Judge Sedwick explained in that letter that he lacked discretion in imposing a life sentence and that he doubted Defendant would receive "more time than he has already served" if sentenced at the time of the letter.²⁵ Nearly five years later, this Court finds that the 26 year sentence Defendant has served to date is sufficient to address the seriousness of the offense, promote respect for the law, deter Defendant and others, provide just punishment, and protect the public. Therefore, reducing Defendant's sentence and granting the Motion is consistent with the factors set forth in § 3553(a).

C. Extraordinary and Compelling Reasons

The applicable policy statement issued by the United States Sentencing Commission, § 1B1.13 of the United States Sentencing Guidelines Manual ("USSG"), explains that extraordinary and compelling reasons exist when the defendant is "(I) suffering from a serious physical or medical condition" or "(III) experiencing deteriorating physical or mental health because of the aging process."²⁶ Extraordinary and compelling reasons also exist when the

²³ According to the Presentence Report (PSR), Defendant received two criminal history points for two prior alcohol-related driving offenses and an additional two points for being on probation for those driving offenses when he committed the federal drug offenses. Hence, the four criminal history points placed Defendant in criminal history category III. However, in the Statement of Reasons when adopting the PSR, Judge Sedwick found that the correct total of criminal history points was only two and defendant's criminal history most closely resembled a criminal history category I. Dkt. 711-6 at 4.

²⁴ Dkt. 711-2 (Letter).

²⁵ *Id.* at 2–3.

²⁶ U.S. Sentencing Guidelines Manual § 1B1.13 cmt. n.1(A)(ii) (U.S. Sentencing Comm'n 2018).

defendant “(i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the ageing process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.”²⁷ Section 1B1.13 imposes an additional consideration of whether the defendant is a danger to the safety of any other person or to the community.²⁸

In this case, Defendant qualifies for compassionate release due to his medical conditions and age, particularly in light of the ongoing coronavirus (COVID-19) pandemic, and time spent in custody, as well as his remarkable history of rehabilitation while in custody and several prior recommendations by his wardens, the U.S. Probation office, and Judge Sedwick to reduce or commute his sentence. It is clear on the record that Defendant is not a danger to the community and the Motion should be granted.

1. Medical Condition of the Defendant

USSG § 1B1.13 cmt. n.1(A)(ii) specifically considers the medical condition of the defendant as a circumstance under which extraordinary and compelling reasons exist to warrant the defendant’s compassionate release. Here, Defendant qualifies because he is “experiencing deteriorating physical or mental health because of the aging process.”²⁹ Defendant states that “[t]he cartilage around his knee, hip, and shoulder joints is severely worn-down causing bone on bone contact and severe pain. He has lower back pain due to moderate to severe deterioration of his lumbar spinal discs. He also has arthritis in his wrists and hands, high blood pressure, a swollen prostate, age related eyesight and hearing loss, and suffers from post herpetic neuralgia (a

²⁷ *Id.* at cmt. n.1(B).

²⁸ *Id.* § 1B1.13(2).

²⁹ U.S. Sentencing Guidelines Manual § 1B1.13 cmt. n.1(A)(ii)(III).

complication of the shingles virus for which there is no cure).”³⁰ In addition, Defendant is over 70 years old and thus within the age group that the Center for Disease Control recognizes as being at higher risk for severe illness, such as COVID-19.³¹ The Court finds that COVID-19 presents a clear and present danger for individuals who are in custody.³² If COVID-19 reaches Defendant’s custodial facility, his ability to follow recommended self-care and public health guidance is substantially diminished by the restrictions inherent to his environment.³³ Notwithstanding, Defendant is not expected to recover from deteriorating health because of the aging process.³⁴ Therefore, Defendant has presented extraordinary and compelling reasons based on medical conditions in support of his Motion.

2. Age of the Defendant

In addition to experiencing serious deterioration in physical or mental health because of the aging process, USSG § 1B1.13 cmt. n.1(B) considers extraordinary and compelling reasons for release exist when defendants are “at least 65 years old” and have “served 10 years or 75 percent of his or her term of imprisonment, whichever is less.” Here, Defendant falls squarely within these qualifications. He is over 70 years old and has served over 26 years in prison. As

³⁰ Dkt. 711 at 17–18.

³¹ Center for Disease Control, Coronavirus Disease 2019 (COVID-19), People Who Are at Higher Risk, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> (last visited Apr. 7, 2020).

³² See Federal Bureau of Prisons, COVID-19 Coronavirus, <https://www.bop.gov/coronavirus/> (tracking the number of COVID-19 cases in BOP facilities on a daily basis) (last visited Apr. 9, 2020).

³³ See U.S. Sentencing Guidelines Manual § 1B1.13 cmt. n.1(A)(ii).

³⁴ See *id.*

described above, he meets the requisite medical conditions for release. Therefore, Defendant has again presented extraordinary and compelling reasons to support his Motion.

3. Other Reasons

USSG § 1B1.13 cmt. n.1(D) permits the consideration of other extraordinary and compelling reasons “[a]s determined by the Director of the Bureau of Prisons.” Even without the prerequisite determination by the Director of the Bureau of Prisons, several factors in Defendant’s case warrant discussion here. First, Judge Sedwick, the sentencing judge, has written to support the commutation of Defendant’s sentence.³⁵ Second, two wardens and an assistant director of the Department of Justice Correctional Programs Division have also written to recommend Defendant for sentence reduction.³⁶ Each authority has recognized that Defendant meets the criteria for sentence reduction, is not a risk to the community, or a risk of reoffending.³⁷ Third, Defendant has obtained significant education and vocational certifications while in custody and now even trains other inmates.³⁸ The BOP staff at his current facility praised Defendant, stating “Plunk sets the example in many ways and it is evident in the way he has embraced his current condition and encourages others to maintain a positive outlook on life. . . he has learned from his mistakes and will be a great assets to others in and out of prison.”³⁹ More recently, the staff noted, “Inmate Plunk has been a model inmate while incarcerated at FCI Jesup.”⁴⁰ The recommendation letters,

³⁵ Dkt. 711-2.

³⁶ Dkts. 711-3 (Letter); 711-4 (Letter); 711-7 (Letter).

³⁷ Dkts. 711-2 at 2–3; 711-3 at 2, 4; 711-4 at 2; 711-7 at 2.

³⁸ See 711-11 (Certifications); 711-12 (Summary Reentry Plan).

³⁹ Dkt. 711-12 at 5.

⁴⁰ Dkt. 711-13 at 5.

achievement certifications, and staff evaluations clearly support that Defendant has taken his rehabilitation seriously and that presents other reasons worth consideration for release.

4. Danger to Others or the Community

Finally, a court must consider the “nature and seriousness of the danger to any person or the community” that the defendant’s release would pose.⁴¹ The Court finds that many of the foregoing reasons weigh heavily in favor of Defendant. His age, medical conditions, and rehabilitative achievements all demonstrate that Defendant would not be a danger to any person or the community. Furthermore, Defendant has a verified release plan and proposes living with his sister in California. A U.S. Probation Officer has approved that residence and acknowledged, “considering his personal characteristics and criminal history, it does not appear that [Defendant] poses a third party risk to any specific individual/entity as a result of his residence.”⁴² Accordingly, the Court finds that Defendant is not a danger to any person or community upon release.

⁴¹ U.S. Sentencing Guidelines Manual § 1B1.13(2) (citing 18 U.S.C. § 3142(g)).

⁴² Dkt. 711-15 at 2.

V. CONCLUSION

Therefore, the Court finds that the 18 U.S.C. § 3553(a) sentencing factors, extraordinary and compelling reasons under 18 U.S.C § 3582(c)(1)(A) and USSG § 1B1.13, and consideration of the applicable U.S. Sentencing Commission policies warrant Defendant's immediate compassionate release. Furthermore, upon release, Defendant will not post a danger to any person or the community under 18 U.S.C. § 3142(g). Accordingly, the Motion at Docket 711 is **GRANTED**. Defendant shall be released from BOP custody as soon as the release plan is implemented, and travel arrangements made. The corresponding Judgment shall be issued forthwith.

IT IS SO ORDERED.

Dated at Anchorage, Alaska, this 9th day of April, 2020.

/s/ Timothy M. Burgess
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE