Multiple Documents

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2	Exhibit 1
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Exhibit 7

FACSIMILE FILING COVER SHEET

JD-CL-73 Rev. 5-10

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Fax number of above Court
(860) 566-1983

Docket number
TSR-CV17-4008971-S

(Include prefix: for example, CI, CP, CR, CV, FA, HC, JV, MI, MV, SC, SP)

Title of document faxed
Emergency Motion to Admit Petitioner to Bail

Number of pages
17

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From:

Name *(Print or type full name of person to be contacted, if necessary)*	Date
Andrew P. O'Shea	**04/13/2020**

I am an attorney or law firm excluded from e-filing: ☐ Yes ☐ No Juris number: _____

Telephone number *(Include area code)*	Fax number *(Include area code)*
(860) 522-7000	**(860) 522-7001**

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STATE OF CONNECTICUT
GEOGRAPHICAL AREA 19 AT ROCKVILLE

CV-17-4008971-S

ROBERT DAY, #253376

V.

COMMISSIONER OF CORRECTION APRIL 13, 2020

EMERGENCY MOTION TO ADMIT PETITIONER TO BAIL

The petitioner respectfully moves this Court, *Bhatt, J.*, to admit him to bail during the pendency of the instant case, until the danger to his life from the spread of SARS-CoV-2 is mitigated. Last week, the MacDougall Principal Physician concluded that the petitioner is at a high risk of death if he were to contract COVID-19, due to the petitioner's heart condition. Accordingly, the respondent's physician requested that the petitioner be released on medical parole. Unfortunately, the reaction of the Board of Pardons and Paroles (BoPP) and the Department of Correction (DoC) was to schedule the matter for an administrative hearing in six weeks. Given the life-threatening urgency of protecting the petitioner from contracting COVID-19, he respectfully moves this court to admit him to a $50,000 bail, along with various conditions of release, until the threat to his life within the state prisons is mitigated.

In 2014, the petitioner was convicted of attempted robbery in the first degree, assault on an elderly person, and criminal possession of a firearm stemming from the attempted robbery of the Pereira Liquor store, during which the would-be robber shot Mr. Pereira in the shoulder. Mr. Day has consistently insisted he was at Dorcester Ave coaching a group of neighborhood children at the time of the shooting, and a number of witnesses have corroborated that. However, the jury never heard that alibi evidence,

and Mr. Day was convicted based primarily on the cross-racial eyewitness identifications of Mr. and Mrs. Pereira (which resulted from procedures that the Appellate Court concluded were unnecessarily suggestive), and Mr. Day received a total effective sentence of 30 years. See *State v. Robert Day*, 171 Conn. App. 784 (2017). In 2015, the Connecticut Innocence Project concluded the petitioner was innocent and assigned the undersigned's firm to represent him.

In early 2018, after a heart attack, Mr. Day was diagnosed with a terminal cardiomyopathy. As a result, he received an implanted defibrillator, which saved his life during another heart attack in June of 2018. This past September, he had another alarming heart episode that required his hospitalization. Mr. Day will continue to suffer heart attacks until his heart fails or he receives a heart transplant. As a result of Mr. Day's condition, he faces a substantial risk of sudden death at any moment. Indeed, his cardiologist estimated that he has a 20% chance of terminal heart failure in 2019. See Exhibit A, Kathryn Porter, General Note (July 30, 2018). That chance increases every year unless he is able to obtain a heart transplant, for which he is presently ineligible. As a result of the petitioner's condition, he is unable to engage in any strenuous activity without the risk of triggering another heart attack. In addition, he has suffered from intense anxiety while incarcerated, which has exacerbated his risk of a heart attack. Accordingly, until recently, the DoC has complied with the petitioner's cardiologist's recommendation in January of 2019 that the petitioner's cell door remain open. See Exhibit B, Kerry Cipriani, Progress Note (January 14, 2019). However, recently, the DoC removed the petitioner from the infirmary and placed him back with general population.

Last week, Dr. Omprakash Pillai, the Principal Physician at MacDougall

Correctional Institution, wrote a letter to the BoPP recommending that Mr. Day be released on medical parole because "Mr. Day is at high risk of mortality if he were to contract COVID-19." Exhibit C. Dr. Pillai further explained that "[i]f infected with COVID-19, [the petitioner's] ability to survive is extremely compromised." The MacDougall medical department informed the undersigned that, in response to Dr. Pillai's letter, the BoPP scheduled an administrative hearing on May 27, 2020 to consider the matter. Although the respondent has implemented a number of measures to attempt to limit the spread of SARS-CoV-2, the virus has nevertheless continued to spread through the prison population. Exhibit D, Department of Correction, *Health Information and Advisories*, available at https://portal.ct.gov/DOC/Common-Elements/Common-Elements/Health-Information-and-Advisories (last visited April 13, 2020). The unfortunate reality is that the virus will continue to spread, greatly assisted by the large period of time during which infected individuals, including corrections officers, may be asymptomatic. Accordingly, it is not a question of whether the petitioner will develop COVID-19, which will likely kill him, but when.

Given the "high risk of mortality" that Mr. Day faces if he continues to be incarcerated, waiting until May 27 for a hearing will not suffice. The undersigned reached out to the State's Attorney for the Judicial District of Waterbury regarding a potential sentence modification to resolve this issue, but the State objects to any modification, and the undersigned believes counsel for the respondent also objects to the instant motion. The undersigned has also reached out to the DoC and the BoPP regarding the petitioner's situation, but has not received any responses thus far. Accordingly, the only remaining available means by which the steps necessary to

protect the petitioner's life can be taken would be this Court allowing him to be temporarily released on bond.

This Court has the inherent common law authority to admit habeas petitioners to bail during the pendency of their cases. See *Carino v. Watson*, 171 Conn. 366, 368-71 (1976); *Guadalupe v. Commissioner of Correction*, 68 Conn. App. 376, 387-88 (2002); *Rose v. Nickeson*, 29 Conn. Supp. 81, 82-3 (1970); see also *Gaines v. Manson*, 194 Conn. 510, 529 (1984); *Winnick v. Reilly*, 100 Conn. 291, 297-301 (1924); *Cinque v. Boyd*, 99 Conn. 70, 92-93 (1923). The petitioner is not a flight risk or a danger to the community. His medical condition prevents him from being such; any stressful activity increases the chance of his sudden death. He has already had two heart attacks, each of which further reduces his ability to survive the next. In addition, the petitioner is dedicated to proving his innocence of the crimes for which he was convicted. Furthermore, various conditions of release, including prohibiting the petitioner from leaving his residence and complying with all rules and policies there, would be sufficient to address any concerns. The undersigned has retained the services of a social worker to assist with locating housing that could protect the petitioner from SARS-CoV-2 to the best extent possible, as well as provide the medical treatment he needs for his terminal heart condition.

Finally, the petitioner, who is indigent, has limited means to post any significant bond. The undersigned has spoken with the petitioner's brother (who is seeking SSDI benefits) and father (who recently lost his job at a car dealership). They could exhaust their resources to come up with some funds, but not much. Accordingly, the petitioner respectfully requests that any bail imposed be no more than $50,000, and that the court

allow an option for the petitioner to post such via 10% cash, to minimize the economic hardship this would incur on his family, which is already facing severe financial strain due to the economic impact of SARS-CoV-2.

Given the fact that the petitioner has a high risk of death from COVID-19, and the certainty that he will eventually contract that disease if he remains incarcerated, the failure to release the petitioner to seek safer housing in some form or another has an unconscionably high risk of converting his thirty year sentence into a death sentence. Furthermore, the petitioner suffers from a serious physiological medical condition that precludes him from being a flight risk or danger to the community. Accordingly, there is sufficient justification in these extraordinary circumstances to admit the petitioner to bail until the risk to his life while incarcerated can be mitigated.

Respectfully submitted,
ROBERTY DAY, #253376
The Petitioner

By _____

Andrew P. O'Shea
Kirschbaum Law Group, LLC
433 South Main Street, Suite 101
West Hartford, Connecticut 06110
Tel (860) 522-7000 x107
Fax (860) 522-7001
Email andrew@kirschbaumlaw.com
Juris No. 433768

HIS ATTORNEYS

ORDER

The foregoing emergency motion to admit petitioner to bail is hereby ordered:

GRANTED/DENIED

_____

Judge

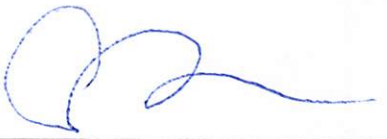
Date Signed:

CERTIFICATION

It is hereby certified that on Monday, April 13, 2020, a copy of the foregoing was faxed or mailed, postage pre-paid, to:

Eva B. Lenczewski
Supervisory Assistant State's Attorney
Office of the State's Attorney
400 Grand Street
Waterbury, CT 06702
Tel (203) 236-8130
Fax (203) 236-8155
Juris No. 401816
DCF.WaterburyJD@ct.gov

Robert Day, #253376
MacDougall-Walker Correctional Institution
1153 East Street South
Suffield, Connecticut 06080



Andrew P. O'Shea

EXHIBIT A

ROBERT DAY **INMATE ID #: 00253376** **41 Years Old**
DOB: [redacted] **Race: Black or African American** **Gender: Male**
LOC: 137 Z -03 **Med Score: 5 Sub Score: .....** **MH Score: 3 Sub Score: ....**

07/30/2018 - General Note: Nurse : Discharge Planning
Provider: Kathryn K. Porter LPN
Location of Care: MacDougall Building

Encounter Context
Facility at time of evaluation: MacDougall Building
Age at Time: 41 Years Old

General Note

General Note Type: Nurse
Subject: Discharge Planning
Note: Met with I/M and reviewed outcome of telephone call from UConn Health Cardiology MD (Dr. Balakumaran) received on 7/26/18. Explained to I/M that his Cardiology team have reported that he currently is NOT a transplant candidate as he does not meet criteria at the present time. MD explained that I/M prognosis has improved since he is tolerating and responding well to his medication regimen. MD explained plan to perform ablation with goal of reducing or eliminating PVC's which will, in turn, potentiate the efficacy of his defibrillator. Explained that MD gave 1 year life expectancy of 80%, with figure reducing annually by 5% and stated he currrently is NOT terminal; however, he remains at risk of sudden death and his heart will continue to weaken if/when the defribrillator activates as it does result in muscle damage. MD gave suggestion of requesting 2nd opinion at Hartford Hospital if/when condition deteriorates. Discussed importance of maintaining community standard of care to the I/M despite incarcerated status to MD who expressed understanding. Writer further explained BOPP process and purpose of questions posed was to provide a clearer prognosis for facility medical staff to determine whether I/M met criteria to be CONSIDERED for medical parole by BOPP. MD expressed understanding. I/M expressed understanding of writer and MD conversation as explained by writer. Offered assurance that medical parole will remain an option if appropriate in the future. Will continue to monitor status and provide discharge planning as appropriate.

Electronically signed by Kathryn K. Porter LPN on 07/30/2018 at 1:22 PM

EXHIBIT B

Day, Robert (MR # [redacted]) DOB: [redacted] Encounter Date: 01/14/2019

Day, Robert

MRN: [redacted]

Clinical Support 1/14/2019
UConn Health Department of Cardiology

Provider: Pickett, Christopher C, MD (Cardiology)
Primary diagnosis: Dilated cardiomyopathy (CMS/HCC)
Reason for Visit: Referred by Harrison, Scott E, PA-C

Progress Notes

Cipriani, Kerry, APRN (Nurse Practitioner) • Cardiology

Calhoun Cardiology Center
UCONN Health
Device Clinic Note

See Linked Documents for full report.

LV lead turned off and reprogrammed to VVI 40. Multiple vectors attempted without reduction in PVCs. Findings dicussed with Dr. Balakumaran at time of interrogation.

Patient has underlying anxiety and claustrophobia which produces significant stress when his cell block door is closed. To limit undue stress, and because of his underlying cardiomyopathy with severely depressed EF, his cell door should remain open at all times.

Please increase torsemide to 180mg QD for 2 days then resume 120mg QD

Follow up in 2 weeks for cardiology visit with Dr. Balakumaran

Check chem 7

Instructions

Return in about 2 weeks (around 1/28/2019).

Patient Instructions

Additional Documentation

Flowsheets: Travel and Exposure Screening
Encounter Info: Billing Info, History, Allergies

Orders Placed

Basic metabolic panel

Other Orders Performed

ICD - Implantable Cardioverter Defibrillator

Medication Changes

As of 1/14/2019 2:12 PM

None

Visit Diagnoses

Dilated cardiomyopathy (CMS/HCC) I42.0

EXHIBIT C

STATE OF CONNECTICUT
DEPARTMENT OF CORRECTION
MacDougall-Walker Correctional Institution
1153 East Street-South, Suffield, CT. 06080

April 6, 2020

Chairperson Carleton J. Giles
State of Connecticut Board of Pardons and Parole
55 West Main Street, Suite #520
Waterbury, CT 06702

Re: Request for Medical Parole
Robert Day DOC# 253376 D.O.B.: [redacted]

Dear Chairperson Giles,

Mr. Robert Day is a 42-year old male who is serving a 30-year sentence for Assault 1st, Victim 60 or over. He has been incarcerated since 09/04/2012 and began serving his sentence 2/19/2014.

He was initially admitted to UCONN Hospital from 02/05/2018 until 02/09/2018 and diagnosed with cardiomyopathy. He returned to the facility and experienced sudden cardiac arrest on 2/26/2018. He had a cardioverter defibrillator implanted during his hospitalization and returned to the Infirmary at MacDougall CI. He has required Infirmary level of care since his cardiac arrest. Approximately 4 months later (06/29/2018) his defibrillator fired 5 times and he was hospitalized again. In the months that followed, he has had multiple Emergency Department visits, Cardiology consultations, Cardiac Ablation, revision to his biventricular pacer due to experiencing PVC's with every paced beat and numerous medication adjustments. He has gone into renal failure, fluid overload, worsening congestive heart failure and required additional procedures to address these complications.

On 9/19/19 he experienced VF arrest. His ICD was interrogated and revealed that he had experienced PVC induced ventricular fibrillation as his ventricular rates were in excess of 300 beats per minute. Amiodarone was again tried but it did not suppress PVCs and resulted in elevated LFTs. This most recent event occurred while he was sitting, reading a book. Previous cardiac symptoms were associated with activity, including activity as minor as showering.

Confidential

Mr. Day fluctuates between Class II and Class III heart failure. The eventual goal is heart transplantation. Although on initial presentation, he appears to be in a state of relative health, without a heart transplant the reality of his prognosis, coupled with the cardiac events he has already experienced since diagnosis 26 months ago indicate clearly that he is living with a critical and terminal health condition. If infected with COVID-19, his ability to survive is extremely compromised.

Being in a correctional facility poses a unique challenge as maintaining safety and security is the ultimate concern. Allowing emergency personnel, paramedics and ambulances into the facility is an arduous process which takes time when time is of the essence. Having an ICD surely does not guarantee cardiac resuscitation will occur, plus, additional damage to an already weakened and damaged heart occurs with each defibrillation. If Mr. Day were afforded the opportunity to reside at home, these barriers would be significantly lessened. His physical condition prohibits him from being able to be physically active without the reality of collapse/syncope occurring. He is capable of ambulating and performing his own ADL's, but his strength and stamina have shown a continual gradual decline. Since his admission to MacDougall Correctional Institution he has resided in the Infirmary due to his fragile medical condition and need for twenty-four nursing and medical care. Presently, he is able to tend to his custodial care needs with moderate assistance required. Mr. Day has a large supportive family who have expressed willingness to care for him in their home(s). Due to his weakened heart and complicated medical conditions, Mr. Day is at high risk of mortality if he were to contract COVID-19.

Feel free to contact me at MacDougall Correctional Institution, Medical Department at 860-627-2168, if there are any questions.

Sincerely,

Omprakashpillai

Omprakash Pillai, MD
CT Department of Correction
Health Services Unit
Principal Physician
MacDougall Correctional Institution

EXHIBIT D

Health Information and Advisories

Coronavirus Information

The COVID-19 Tracker chart for Friday, April 10, 2020 does not include update information on offenders,

only the data related to staff has been updated.

The information related to the offenders is accurate as of Thursday, April 9,

the offender information will be updated Monday, April 13.

Department of Correction
Covid-19 Tracker
(as of 2:00 p.m. 04/10/20)

FACILITY	Staff Members Tested Positive for COVID-19	Inmates Tested for COVID-19	Inmates Positive for COVID-19	Inmates * Negative for COVID-19
Bridgeport CC	6	12	6	4
Brooklyn CI	0	0	0	0
Cheshire CI	5	0	0	0
Corr-Rad CC	12	4	0	1
Garner CI	3	0	0	0
Hartford CC	16	16	6	3
MWCI	3	0	0	0
Manson Youth	0	0	0	0
New Haven CC	3	4	1	3
Northern CI	1	47	47	0
Osborn CI	1	19	1	2
Carl Robinson CI	5	9	0	0
Willard Cybulski	3	29	0	2
York CI	1	3	0	1
Parole	1			
Training Acadamy	11			
Central Office	0			
Totals:	**71**	**143**	**61**	**16**

** A number of tests results are still pending*

General Information

Court	United States District Court for the District of Connecticut; United States District Court for the District of Connecticut
Federal Nature of Suit	Prisoner Petitions - Civil Rights[550]
Docket Number	3:20-cv-00534