

## Some Arguments for Release in the Time of COVID-19

### I. **The COVID-19 pandemic is a changed circumstance that materially bears on the safety of the community, justifying reopening a bail hearing under 18 U.S.C. 3142(f).**

- The coronavirus pandemic is “unprecedented and extraordinarily dangerous,” and “inmates may be at a heightened risk of contracting COVID-19 should an outbreak develop.” *United States v. Stephens*, ---F. Supp.3d---, 2020 WL 1295155, at \*2 (S.D.N.Y. March 19, 2020). In jails, “[t]he probability of transmission of potentially pathogenic organisms is increased by crowding, delays in medical evaluation and treatment, rationed access to soap, water, and clean laundry, [and] insufficient infection-control expertise.” Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 *Clinical Infectious Diseases* 1047, 1047 (Oct. 2007), <https://doi.org/10.1086/521910>
  - *United States v. Jaffee*, No. 19-cr-88 (D.D.C. Mar. 26, 2020) (releasing defendant with criminal history in gun & drug case, citing “palpable” risk of spread in jail and “real” risk of “overburdening the jail’s healthcare resources”; “the Court is . . . convinced that incarcerating the defendant while the current COVID-19 crisis continues to expand poses a greater risk to community safety than posed by Defendant’s release to home confinement”).
  - *United States v. Harris*, No. 19-cr-356 (D.D.C. Mar. 26, 2020) (“The Court is convinced that incarcerating Defendant while the current COVID-19 crisis continues to expand poses a far greater risk to community safety than the risk posed by Defendant’s release to home confinement on . . . strict conditions.”).
- Infection-control measures used in the jail setting—namely, separating the sick from the well—may be “almost impossible” to put in place in “prison systems or jails that are full.” Jennifer Gonnerman, Q and A: How Prisons and Jails Can Respond to the Coronavirus, *The New Yorker* (March 14, 2020), <https://www.newyorker.com/news/q-and-a/how-prisons-and-jails-can-respond-to-the-coronavirus>
- The ability to limit the spread of coronavirus is further limited by existing staffing shortages—which will only become worse as staff members become sick or are forced to self-quarantine. See Lauren Weber, *Coronavirus Puts Prisons In Tight Spot Amid Staff Shortages, Threats Of Lockdown*, *Kaiser Health News* (March 12, 2020), <https://khn.org/news/coronavirus-puts-prisons-in-tight-spot-amid-staff-shortages-threats-of-lockdown/>
- According to a March 20, 2020, report, 22 inmates at local Denver jails were under observation with suspected coronavirus. Elise Shmelzer, *22 inmates at Denver’s two jails under observation after showing coronavirus symptoms, none have been tested*, *Denver Post* (March 20, 2020), <https://www.denverpost.com/2020/03/20/denver-jail-coronavirus-observation/>
- The spread of coronavirus in the jail/prison setting does not only place inmates at risk—it is a matter of public safety. Prison staff are members of the public. Placing them at increased risk of

infection places the community at risk—especially because they leave the jail/prison setting and thus risk further spread of the disease.

- Critically ill inmates who require hospitalization strain already burdened medical systems.
- *If client belongs to a high-risk group and is therefore more likely to require intensive care if/when they become sick, explain why: age, chronic diseases, etc.*
- When medical systems reach or exceed their capacity—e.g., when there are more critically ill patients than ICU beds—outcomes are worse for everybody. “A large surge in the number of persons with serious infections can compromise the ability of the healthcare system to deliver necessary health care to the public.” Jared Polis, Governor, *Guidance to Counties, Municipalities, Law Enforcement Agencies, and Detention Centers*, at 1 (March 24, 2020), <https://aclu-co.org/wp-content/uploads/2020/03/Guidance-to-Counties-Municipalities-Law-Enforcement-Agencies-and-Detention-Centers-2.pdf>
- As government leaders and medical experts have recognized, reducing the prison population by releasing (or not detaining) relatively low-risk defendants is critical to community safety. See Daniel A. Gross, “*It Spreads Like Wildfire*”: *The Coronavirus Comes to New York’s Prisons*, *The New Yorker* (March 24, 2020), <https://www.newyorker.com/news/news-desk/it-spreads-like-wildfire-covid-19-comes-to-new-yorks-prisons>
- Colorado Governor Jared Polis has issued guidance to state and local law enforcement agencies intended to reduce the number of individuals held in jails at any time. For example, he has directed law enforcement to “[i]ncrease the use of warnings or summons in lieu of arrest when safe to do so” “issue a warning or summons instead of effectuating a warrantless arrest when there is no clear risk of physical harm to others or the community”; “extend the return date on the summons to minimize detention center and courthouse contacts”; in criminal cases, “issue a summons instead of a warrant where there is no clear risk of physical harm to others or the community, except where otherwise prohibited by statute”; and “implement pretrial diversion and release methods to lower the number of individuals held in custody at any given time.” Jared Polis, Governor, *Guidance to Counties, Municipalities, Law Enforcement Agencies, and Detention Centers*, at 2-3 (March 24, 2020), <https://aclu-co.org/wp-content/uploads/2020/03/Guidance-to-Counties-Municipalities-Law-Enforcement-Agencies-and-Detention-Centers-2.pdf>
- Chief Judge of Colorado’s Second Judicial District (Denver County) issued an order instructing that “Defendants with less than 30 days remaining on imposed sentences, currently serving work release sentences, or determined to be an at-risk defendant based on health factors” be identified and considered for release. Administrative Order Regarding Court Operations Under COVID-19 Advisory ¶ 2(f) (Colo. 2d Judicial Dist. March 20, 2020)

**II. Temporary release of a person in custody to “another appropriate person” is justified under 18 U.S.C. § 3142(i).**

- Section 3142(i) provides that, where a detention order has been issued, “a judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person’s defense or for another compelling reason.
- Severe restrictions put in place by BOP/state and local governments in response to the coronavirus pandemic interfere with client’s ability to prepare their defense, and temporary release is justified.
- Cite any difficulties calling/visiting clients; state/local stay-home orders; medical risks; etc.
- COVID-19 is a “compelling reason” for release. *See* the order in *United States v. Selna*, 8:16-cr-76-JVS (C.D. Cal. Mar. 26, 2020) (“Michaels has demonstrated that the Covid-19 virus and its effects in California constitute ‘another compelling reason’” justifying temporary release under § 3142(i).).
- “Compelling reasons may exist . . . where the defendant’s serious medical conditions warrant release, *see, e.g., United States v. Rebollo-Andino*, 312 F. App’x 346, 348 (1st Cir. 2009) (explaining that a defendant who is denied bail “retains the ability to request[,] ... in extraordinary circumstances, ... temporary release under § 3142(i)” should future developments with respect to his medical conditions so warrant). o
- “Appropriate person” for purposes of § 3142(i) can include family members. *E.g., United v. Stephens*, ---F. Supp. 3d---, No. 15-CR-95 (AJN), 2020 WL 1295155, at \*3 (S.D.N.Y. Mar. 19, 2020) (finding that defendant’s mother was an “appropriate person”).