

STATE OF WISCONSIN      CIRCUIT COURT      WAUKESHA COUNTY

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STATE OF WISCONSIN,

Plaintiff,

Case No. [REDACTED]

vs.

[REDACTED]

Defendant.

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DEFENDANT’S NOTICE OF MOTION  
FOR MODIFICATION OF BAIL

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**Introduction**

Defendant moves the Court for a bail hearing at the Court’s earliest opportunity and for an order granting her release on a signature bond. [REDACTED], who is a pretrial defendant currently detained at the Waukesha County Jail, is within the group of people the Centers for Disease Control and Prevention (“CDC”) has categorized as most-at-risk for contracting COVID-19, a dangerous illness spreading rapidly across the world, through Wisconsin and has now been found in Waukesha County. The Defendant brings this motion pursuant to the 8th and 14th Amendments to the United States Constitution; article I, sections 6 and 8 of the Wisconsin Constitution; chapter 969 of the Wisconsin Statutes; *State v. Iglesias*, 185 Wis. 2d 117, 517 N.W.2d 175 (1994); and *Whitty v. State*, 34 Wis. 2d 278, 149 N.W.2d 557 (1967).

The health risk to [REDACTED] because of her health conditions and given the conditions at the Waukesha County Jail and the statutory provisions in 969.01 necessitates her release on bail. These decisions could certainly be revisited after this pandemic has ended. As noted in 969.01 defendants are eligible for release under reasonable conditions. Among the many considerations,

the defendant's history, if any, of bail forfeitures, failures to appear, or history with probation are of particular importance here because ██████ has no such history. Further, the State of Wisconsin has a policy against unnecessary detention of defendants pending trial. (See 969.01(4), Wis. Stats. ██████ has housing available to her with either her mother or her father here in Wisconsin. Of course, electronic monitoring is also available if the Court feels that it necessary.

### **Factual Background**

#### ***Changed Circumstances: COVID-19 Outbreak***

As of March 12, 2020, the new strain of coronavirus which causes COVID-19, has infected over 180,000 people, leading to at least 7,000 deaths worldwide.<sup>1</sup> On March 11, 2020, the World Health Organization officially classified COVID-19 as a pandemic.<sup>2</sup> Governor Evers declared a State of Emergency on March 12, 2020. There are now 47 active cases of COVID-19 in Wisconsin and the Governor has banned large gatherings.<sup>3</sup> Donald Trump said yesterday (3/16/20) afternoon that crowds of 10 people should be avoided.

The CDC has issued guidance that individuals at higher risk of contracting COVID-19—adults over 60 years old and people with chronic medical conditions such as lung disease, heart disease, and diabetes—take immediate preventative actions, including avoiding crowded areas and staying home as much as possible.<sup>4</sup> With confirmed cases in Wisconsin that indicate community spread, we must take every necessary action to protect vulnerable populations and

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

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

<sup>3</sup> *Governor Orders Ban on Gatherings as Virus Spreads*, (March 16, 2020) at AP News.com.

<sup>4</sup> *People at Risk for Serious Illness from COVID-19*, CDC (March 12, 2020) at <https://bit.ly/2vgUt1P>.

the community at large.

### *Conditions of Confinement and Spread of Coronavirus*

Conditions of pretrial confinement create the ideal environment for the transmission of contagious disease.<sup>5</sup> Inmates cycle in and out of BOP pretrial facilities from all over the world and the country, and people who work in the facilities leave and return daily, without screening. Incarcerated people have poorer health than the general population, and even at the best of times, medical care is limited in pretrial detention centers.<sup>6</sup> Many people who are incarcerated also have chronic conditions, like diabetes or HIV, which makes them vulnerable to severe forms of COVID-19. According to public health experts, incarcerated individuals “are at special risk of infection, given their living situations,” and “may also be less able to participate in proactive measures to keep themselves safe;” “infection control is challenging in these settings.”<sup>7</sup> Outbreaks of the flu regularly occur in jails, and during the H1N1 epidemic in 2009, many jails and prisons dealt with high numbers of cases.<sup>8</sup> In China, officials have confirmed the coronavirus spreading at a rapid pace in Chinese prisons, counting 500 cases.<sup>9</sup> Secretary of State Mike Pompeo has called for Iran to release Americans detained there because of the “deeply troubling” “[r]eports that COVID-19 has spread to Iranian prisons,” noting that “[t]heir detention

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<sup>5</sup> Joseph A. Bick (2007). Infection Control in Jails and Prisons. *Clinical Infectious Diseases* 45(8):1047-1055, at <https://doi.org/10.1086/521910>.

<sup>6</sup> Laura M. Maruschak et al. (2015). Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-12. NCJ 248491. Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, at <https://www.bjs.gov/content/pub/pdf/mpsfpi1112.pdf>

<sup>7</sup> “Achieving A Fair And Effective COVID-19 Response: An Open Letter to Vice-President Mike Pence, and Other Federal, State, and Local Leaders from Public Health and Legal Experts in the United States,” (March 2, 2020), at <https://bit.ly/2W9V6oS>.

<sup>8</sup> *Prisons and Jails are Vulnerable to COVID-19 Outbreaks*, The Verge (Mar. 7, 2020) at <https://bit.ly/2TNcNZY>.

<sup>9</sup> Rhea Mahbubani, *Chinese Jails Have Become Hotbeds of Coronavirus As More Than 500 Cases Have Erupted, Prompting the Ouster of Several Officials*, Business Insider (Feb. 21, 2020) at <https://bit.ly/2vSzSRT>.

amid increasingly deteriorating conditions defies basic human decency.”<sup>10</sup> Courts across Iran have granted 54,000 inmates furlough as part of the measures to contain coronavirus across the country.<sup>11</sup> Brooklyn District Attorney Eric Gonzalez, joined by public health experts, has asked Governor Cuomo to grant emergency clemencies to elderly and sick prisoners.<sup>12</sup>

The Waukesha County Jail has suspended public visitation effective March 16, 2020 due to the COVID 19 disease. The Waukesha County Jail is not equipped to protect the health and safety of defendants in their custody during a severe outbreak like this. The jail currently houses over 450 inmates plus a significant amount of staff. The majority of the people detained are housed in small two-man cells with a shared toilet and sink, and eat meals together. There is NO outdoor recreation.

Although attorneys are permitted video visits with clients, the jail does not have a screening mechanism in place for staff or visitors, other than self-reporting. The jail lacks even a basic sign advising people who have traveled to the highest-risk countries not to enter. Staff are not wearing face masks or gloves. There is no hand sanitizer available. The facility does not have any testing for COVID-19 available, and does not know when, if ever, it will have tests. There is no medical ward or facility in place at the jail.

As additional people are arrested who have been out in the community as the coronavirus spreads, if they are not symptomatic, they will be brought into the Waukesha County Jail and held with the existing population, potentially bringing COVID-19 into this population held in

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

<sup>11</sup> Claudia Lauer and Colleen Long, *US Prisons, Jails On Alert for Spread of Coronavirus*, The Associated Press (Mar. 7, 2020) at <https://apnews.com/af98b0a38aaabedbc059092db356697>.

<sup>12</sup> Sarah Lustbader, *Coronavirus: Sentenced to COVID-19*, The Daily Appeal (Mar. 12, 2020) at <https://theappeal.org/sentenced-to-covid-19/>.

large numbers, close quarters, and low sanitary conditions.

### **The Bail Statutes Require [REDACTED] Release**

“Upon petition by...defendant, the court before which the action is pending may increase or reduce the amount of bail or may alter other conditions of release or the bail bond or grant bail if it has been previously revoked...a defendant for whom conditions of release are imposed and who after 72 hours from the time of initial appearance before a judge continues to be detained in custody as a result of the defendant’s inability to meet the conditions of release is entitled to have the conditions reviewed by the judge. See 969.08, Wis. Stats. [REDACTED] situation has changed. There is a pandemic that poses a direct risk to [REDACTED] that is far greater if she continues to be detained during this public health crisis.

[REDACTED] is vulnerable because she is a diabetic. She was taken to a prenatal doctor visit while in custody and according to the reports (10/7/19) furnished by the District Attorney, the jail is not giving her any insulin. They were only checking her sugars twice daily [REDACTED] also has a history of asthma and genetic osteochondromatosis [REDACTED] also has a kidney abnormality and severe anxiety.

As an initial matter, the Court should “bear in mind that it is only a ‘limited group of offenders’ who should be denied bail pending trial.” *United States v. Shakur*, 817 F.2d 189, 195 (2d Cir. 1987) (quoting S. Rep. No. 98-225 at 7, as reprinted in 1984 U.S.C.C.A.N. 3182, 3189); see *United States v. Salerno*, 481 U.S. 739, 755 (1987) (suggesting that “detention prior to trial or without trial is the carefully limited exception” to liberty before trial). One charged with a crime is, after all, presumed innocent. *Stack v. Boyle*, 342 U.S. 1, 4 (1951). A single individual unnecessarily detained before trial is one individual too many, and the increasing use of the practice places tremendous wear on our constitutional system. *United States v. Montalvo-*

*Murillo*, 495 U.S. 711, 723–24 (1990) (Stevens, J., dissenting, joined by Brennan and Marshall, JJ.). Due to the crucial interests involved, it follows that a “case-by-case” approach is required at any stage of the case in assessing the propriety of pretrial detention. *See United States v. Gonzales Claudio*, 806 F.2d 334, 340 (2d Cir. 1986) (discussing due process analysis for evaluating propriety of prolonged pretrial detention, and the interests at stake) (citations omitted), *cert. dismissed sub nom., Melendez-Carrion v. United States*, 479 U.S. 978 (1986).

The courts have long recognized that there is no greater necessity than keeping a defendant alive, no matter the charge. As Judge Weinstein held, “We do not punish those who have not been proven guilty. When we do punish, we do not act cruelly. Continued incarceration of this terminally ill defendant threatens both of these fundamental characteristics of our democracy.” *United States v. Scarpa*, 815 F.Supp.88 (E.D.N.Y. 1993) (pretrial defendant with AIDS facing murder charges released on bail because of the “unacceptably high risk of infection and death on a daily basis inside the MCC”). *See also United States v. Adams*, No. 6:19-mj-00087-MK, 2019 WL 3037042 (D. Or. July 10, 2019) (defendant charged with violation of the Mann Act and possession of child pornography and suffering from diabetes, heart conditions and open sores released on home detention because of his medical conditions); *United States v. Johnston*, No. 17-00046 (RMM) 2017 WL 4277140 (D.D.C. Sept. 27, 2017) (defendant charged with violation of the Mann Act and in need of colon surgery released to custody of his wife for 21 days); *United States v. Cordero Caraballo*, 185 F. Supp. 2d 143 (D.P.R. 2002) (badly wounded defendant released to custody of his relatives).

This Court should consider the “total harm and benefits to prisoner and society” that continued pretrial imprisonment of [REDACTED] will yield, relative to the heightened health risks posed to [REDACTED] during this rapidly encroaching pandemic. *See United States v. D.W.*,

198 F. Supp. 3d 18, 23 (E.D.N.Y. 2016); *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring) (calling for heightened judicial scrutiny of the projected impact of jail and prison conditions on a defendant); *United States v. Mateo*, 299 F. Supp. 2d 201, 212 (S.D.N.Y. 2004) (reducing sentence where defendant’s pretrial conditions were “qualitatively more severe in kind and degree than the prospect of such experiences reasonably foreseeable in the ordinary case”); *United States v. Francis*, 129 F. Supp. 2d 612, 619-20 (S.D.N.Y. 2001) (reducing sentence in acknowledgment of “the qualitatively different, substandard conditions to which the Defendant was subjected” in pretrial detention).

**Conditions of Release Are Available That Allow [REDACTED] To Be Treated Humanely While Also Ameliorating Any Danger To The Community**

From [REDACTED] perspective her life—not only her liberty—is on the line, creating a powerful incentive to abide by any release conditions the Court may impose and changing the calculus that initially led to the effective denial of bail in this case by imposing cash of \$25,000.00. The elderly and chronically ill, no matter what crime they are accused of, pose a lower risk of violating supervision, particularly during a global pandemic during which even leaving the house will endanger their lives.

**Conclusion**

[REDACTED] is among the vulnerable population at heightened risk of getting very sick from this illness. For all of the above reasons [REDACTED] should be granted release on bond.

Dated this 17<sup>th</sup> day of March, 2020.

Respectfully submitted,

KUCHLER & COTTON, S.C.

Electronically signed by  
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