

where the jail is understaffed and underequipped to treat the spread of disease violates Applicant's right to due process under the law.

“[T]he due process rights of a person [detained prior to conviction] are at least as great as the Eighth Amendment protections available to a convicted prisoner.” *Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244, 103 S. Ct. 2979, 2983 (1983). See also *Bell v. Wolfish*, 441 U.S., at 535, n. 16, 545. Accordingly, “the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.” *Deshaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 200, 109 S. Ct. 998, 1005 (1989). This includes “a duty to provide adequate food, shelter, clothing, and medical care. These are the essentials of the care that the State must provide. The State also has the unquestioned duty to provide reasonable safety for all residents and personnel within the institution.” *Youngberg v. Romeo*, 457 U.S. 307, 324, 102 S. Ct. 2452, 2462 (1982). It is a “detainee's constitutional right is to receive the needed medical treatment[.]” *Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 245, 103 S. Ct. 2979, 2984 (1983).

Changed Circumstances: COVID-19 Outbreak

On March 11, 2020, the World Health Organization officially classified COVID-19 as a pandemic. Texas Gov. Greg Abbott declared a State of Emergency on March 13, 2020

Understanding that these numbers are rising at a head spinning rate--as of the date of the filing of this motion:

*Over 170,000 persons globally have contracted COVID-19.

*Over 6,600 persons have died from this disease.

*In the United States there are 3500 confirmed cases and 60 resulting deaths.

The CDC has issued guidance that individuals at higher risk of contracting COVID-19 take immediate preventative actions, including avoiding crowded areas and staying home as much as possible.

Social Distancing is Critical

Dr. Anthony Fauci, the Director of the National Institute of Allergy and Infectious Diseases and a member of the Trump administration's coronavirus task force is the nation's top infectious disease expert .

Dr. Fauci and other medical experts, including the American Medical Association, warn that "**social distancing**" **Is critical to slow the spread of this highly contagious disease**. The term "flattening the curve" is used to describe the extreme mitigating strategy. The strategy is meant to slow down the speed at which the numbers of COVID-19 cases rise to allow hospitals and health care

providers to prepare for surges in infected patients.

This is necessary because otherwise there will not be enough hospital beds, medical supplies treatment materials or medical personnel to treat persons with COVID-19 and persons who need to be hospitalized for other serious ailments.

The US Centers for Disease Control and Prevention defines "social distancing" as "remaining out of places where people meet or gather."

Advisories from US State Department and CDC have strongly recommended social distancing by everyone in the country for many weeks if not months. Originally the call was for 14 days but that has consistently expanded.

Dr. Fauci said that, "America should prepare for a nationwide shutdown to slow the spread of COVID-19."

"Everybody has to get involved in distancing themselves socially. If you are in an area where there's clear community spread, you have to be much, much more intense about how you do that...We have to just accept that if we want to do what's best for the American public.

On March 13, 2020 President Donald Trump declared the COVID-19 pandemic to be a national emergency. The President restricted international travel to the United States. He called for collective action, shared sacrifice, national determination to overcome the threat of this pandemic.

On March 16, 2020 President Trump advised people not to gather in

groups of more than 10 and to stay away from bars, restaurants, and food courts and to refrain from travel.

Texas

In Texas 68 people have been infected with COVID-19 with 29 of them from the Greater Houston region. Two of those persons are in Brazoria County which borders Galveston County.

Galveston County

At least two persons from Galveston have tested positive and another, an attorney, is in quarantine awaiting test results.

On March 17, 2020 the City of Galveston ordered bars and tourist attractions closed and prohibited indoor dining at restaurants.

The City of Galveston has suspended permits for large special events of 250 people and more. All City of Galveston commission and committee meetings have been postponed.

The Galveston mayor and city officials participate on daily conference calls with US Centers for Disease Control and Prevention, GC Health District, and the US Coast Guard. Additionally, the city has closed recreation centers and the community swimming pool.

Schools throughout the nation and in this county, both primary and secondary, have closed. In Galveston County Galveston College, and Texas A&M University of Galveston canceled classes.

What began as extensions of spring breaks have become in person bans

going to the end of the semester. Classes that resume will be taught remotely online and not in person.

Nursing homes, assisted living centers and hospitals, including UTMB in Galveston, County, have restricted visitation.

Cruise lines that sail from Galveston have suspended trips. Carnival Cruise Lines ceased cruises until April 10,2020. Royal Caribbean halted operations for 30 days.

Jail is an "incubators" for COVID-19.

One particularly vulnerable population that cannot practice social distancing is the incarcerated population. While it would seem easy to forget them and keep them locked up and out of the way, **to not practice extreme mitigation with this population can have deadly consequences not only for those who go in and out of jails but for the entire community.**

Jails and prisons are full of people who are released every day and who get locked in every day. Additionally, others who are not inmates constantly cycle in and out of the institutions. Every day and night correctional staff, investigators, vendors, health care workers, educators, attorneys, bail bondsman, social workers, parole officers and probation officers and visitors enter and exit the jail doors. Each of those persons can carry viral conditions to and from their homes and communities. Many detention institutions are currently restricting visitors. But many of those employees cannot be restricted.

In the U.S. steps are already being taken in some jurisdictions to facilitate the release of elderly and sick prisoners and to reduce jail populations by discouraging the refusing the admission of individuals arrested on non-violent misdemeanor charges.

In Ohio and Minnesota officials are trying to find ways to release as many inmates as possible. Some are sent to prison, some released on probation and some put on house arrest.

Ohio Administrative Judge Brendan Sheehan said," Inmates are already in poor health, and it wouldn't take much for the coronavirus to spread wildly behind bars. You gotta remember, the goal of this is to protect the community and the safety of the inmates. If someone's a serious violent person, well, we're using our discretion to make sure the community's safe also." Sheehan also warned of the potential need for empty space to be able to quarantine inmates because of the virus.

Conditions of pretrial confinement create the ideal environment for the transmission of contagious disease. Incarcerated people have poorer health than the general population, and even at the best of times, medical care is limited if existent. Many people who are incarcerated also have chronic conditions, like diabetes or HIV, which makes them vulnerable to severe forms of COVID-19.

Inmates share bathrooms, laundry and eating areas. The toilets in their cells rarely have lids. The toilet tank are used as the sinks. Inmates in the same cells share toilets.

Some hygiene supplies such as soap must be purchased from the commissary. Hand sanitizers are not available due to alcohol content.

There are no open windows so air circulation can be poor. Inmates are in very close proximity to many other inmates.

"We should recall that we have 5,000 jails and prisons full of people with high rates of health problems, and where health services are often inadequate and disconnected from the community systems directing the coronavirus response," said Dr. Homer Venters, former chief medical officer of the New York City jail system. "Coronavirus in these settings will dramatically increase the epidemic curve, not flatten it, and disproportionately for people of color."

Venter is the former chief medical officer on Rikers Island. He supervised efforts to contain the outbreak of the H1N1 virus inside New York City's jails in 2009. Dr. Venters currently runs the Community Oriented Correctional Health Services (C.O.C.H.S.), a nonprofit dedicated to improving correctional health care.

Dr. Venters has stated that, "Rarely do I ever see most of them (sinks) working, plus soap and paper towels. Some of the most basic elements of infection control that we take for granted, like your ability to wash your hands and dry them, remain out of reach for many people in detention."

Robert Greifinger, a correctional health care expert, says, "There are crowding issues, ventilation issues, security issues where people have to be checked and monitored fairly frequently." Greifinger said, "So it's really hard to do. **If jails and prisons are complacent about the coronavirus, he says they run the risk of becoming "incubators" for the disease."**

But jails and prisons can expect a subset of their COVID-19 cases to be serious, and **many of those patients will be sent to local hospitals, adding to the anticipated surge of demand for critical care.**

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 amid increasingly deteriorating conditions **defies basic human decency.**" Courts across Iran have granted 54,000 inmates furlough as part of the measures to contain coronavirus across the country.

Conditions at the Galveston County Jail

The Galveston County Jail currently lacks the resources and space necessary to engage in screening, testing and distancing of inmates, correctional staff, law enforcement officers and other care and service providers who enter the facility. Galveston County Jail is not unique in this and is probably much better than many detention centers. However the circumstances of the COVID-19 pandemic coupled with normal jail conditions are a health catastrophe waiting to happen,

The facility generally houses 1100 inmates. Every day inmates are booked in, released into the community or transported to other facilities.

As additional people are arrested who are not symptomatic will be brought into the Galveston County Jail, and held with the existing population, potentially bringing COVID-19 into this facility in large numbers, close quarters, and low sanitary conditions. Also, inmates will be transported into the jail from other correctional and detention facilities.

Texas Law Requires Release

In Texas both the United States and Texas Constitution guarantee reasonable bail per the Eighth Amendment and Art. 1, Sec. 11 and Sec. 13 respectively. Sec. 13 also demands that all courts shall be open.

Texas Code of Criminal Procedure Art. 17.15 sets out that judges are to determine the amount of bail by considering an amount sufficiently high to give reasonable assurance of appearance in court without being oppressive, the nature and circumstances of the offense alleged, proof of the ability (or inability) to make bail and the future safety of the victim and community.

The circumstances that existed when XXXXX XXXXX was ordered detained at the current bail amount have drastically changed. There is now a pandemic that poses a direct risk that is far greater if XXXXX XXXXX continues to be detained during this public health crisis.

Generally, the safety of the community consideration can sometime require incarceration to protect the community from being further victimized by

an accused. This pandemic event requires that the community be protected by releasing more inmates than not from what has been called an incubator for COVID-19.

Liberty is the norm and “detention prior to trial or without trials is the carefully limited exception.” *United States v. Salerno*, 481 U.S. 739, 755 (1987). 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”).

This Court should consider the “total harm and benefits to prisoner and society” that continued pretrial imprisonment XXXXX XXXXX will yield, relative to the heightened health risks posed to XXXXX XXXXX during this rapidly encroaching pandemic. See *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”).

Keeping inmates locked up in a jail or prison with hundred of others during a pandemic event is incredibly dangerous to XXXXX XXXXX. But it is also dangerous to the community and the correctional staff and courthouse personnel who interact with inmates. And inmates who fall sick in the jail will be transported to hospitals outside of the detention facility taking up valuable bed space.

Conditions of Release Are Available That Allow XXXXX XXXXX To Be Treated Humanely While Also Ameliorating Any Danger To The Community

From XXXXX XXXXX’s 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 high bail amount in this case.

XXXXX XXXXXcan be ordered to abide by social distancing, health conditions and curfew conditions in addition to the usual bond conditions.

Conclusion

XXXXX XXXXX among the vulnerable population at heightened risk of getting very sick from this illness. For all of the above reasons, XXXXX XXXXXshould be granted release on a personal pretrial release bond. In the alternative Applicant requests this Court lower the bond to an amount that is affordable.

WHEREFORE, Applicant respectfully requests that the Court issue the writ of habeas corpus and that the bail be set at personal recognizance with promise to appear.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of the above motion was served by email to the Galveston County Criminal District Attorney contemporaneously with the filing of this motion.

Susan Criss

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