**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**

**STATE OF WEST VIRGINIA,**

**v. Case No. XXX**

 **(Judge JUDGE NAME)**

**CLIENT,**

 **Defendant.**

**MOTION FOR BAIL HEARING AND ORDER**

**RELEASING DEFENDANT ON OWN RECOGNIZANCE**

 The Defendant, **CLIENT**, by counsel, Sara N. Whitaker, moves this Honorable Court for a bail hearing and an Order granting his release. This motion is based on changed circumstances created by coronavirus, or COVID-19, which according to the Administrative Office of the West Virginia Supreme Court of Appeals, “has presented a serious public health risk globally and in the United States.”[[1]](#footnote-1)

 In support thereof, the defendant states the following:

1. CLIENT has been incarcerated at South Central Regional Jail since XXX, unable to afford the present bail.
2. **A global pandemic**. Currently, the United States is experiencing a COVID-19 outbreak via community transmission.[[2]](#footnote-2) On Wednesday, March 11, 2020, the World Health Organization classified the virus as a global pandemic.[[3]](#footnote-3) Two days later, President Donald Trump declared the pandemic a national emergency.[[4]](#footnote-4) On March 13th, West Virginia Governor Jim Justice mandated an unprecedented shut down of all public and private schools across the state.[[5]](#footnote-5) West Virginia government and institutions have taken other aggressive steps to prevent the spread of COVID-19: a ban on visitation at all nursing homes and correctional facilities; suspension of sports and concert events; and a move to online learning at West Virginia University, Marshall University, and other state colleges.[[6]](#footnote-6)
3. On Sunday, March 15th, the Centers for Disease Control and Prevention (“CDC”), urged “a nationwide halt to gatherings of more than 50 people for the next eight weeks.” [[7]](#footnote-7) But the next day, President Trump revised the recommendation, urging people across the country to avoid gathering in groups of more than **ten people**.[[8]](#footnote-8) The U.S. Surgeon General Jerome Adams emphasized “that the United States is at a ‘critical inflection point’ as it grapples with the coronavirus outbreak and said ‘there’s every chance that we could be Italy” if people don’t follow basic public health measures that have been advised in recent weeks.”[[9]](#footnote-9)
4. On Monday, March 16th, Governor Jim Justice declared a State of Emergency for all 55 counties.[[10]](#footnote-10) The same day, the West Virginia Supreme Court of Appeals (”WVSCA”) entered an Administrative Order directing that all civil and criminal trials scheduled through Friday, April 10, 2020, “shall be continued generally, except where a criminal defendant’s speedy trial rights may preclude continuation of such trial.”[[11]](#footnote-11) The WVSCA further directed that with the exception of matters requiring immediate resolutions, “[a]ll other hearings shall be postponed until after April 10 or held by telephone or video.”[[12]](#footnote-12) On Tuesday, March 17th, Governor Justice ordered the closure of all restaurants, bars, and casinos.[[13]](#footnote-13)
5. According to the Centers for Disease Control and Prevention, the people at higher risk of getting very sick from Covid-19 include: (1) Adults over the age of 60, and (2) People who have serious chronic medical conditions like heart disease, diabetes, and lung disease.[[14]](#footnote-14) An analysis of the first one hundred COVID-19 deaths in the United States revealed that 85 percent were people over the age of 60 and more than a third lived in nursing homes or long-term care facilities.[[15]](#footnote-15)
6. **Jails have great potential for outbreak**. One of the greatest threats to health and safety in a pandemic is the local jail system. First, West Virginia jails are consistently over-capacity, causing jails to crowd people into cramped spaces where illness can spread more easily. In 2018 (the most recent year of available data), South Central Regional Jail had an average daily population of 530 people – in a facility designed for 298 people.[[16]](#footnote-16) Second, incarcerated people are particularly vulnerable to the spread of disease due to the unsanitary conditions of confinement. Finally, people regularly cycle in and out of jail. In 2018 the Regional Jail Authority reported that 7,352 entered South Central Regional Jail and 6,755 left the jail to return to the community or other facilities.[[17]](#footnote-17) This massive turnover in jail population pushes illness into the surrounding communities, affecting countless folks – jail employees, law enforcement, probation officers, attorneys, judges, courthouse staff – who come in contact with a person from the point of incarceration to release.
7. **Jails Have Limited Ability to Manage Covid-19**. On March 12, 2020, the Administrator of South Central Regional Jail informed the Office of the Public Defender that if any incarcerated person is identified as having or shows flu-like symptoms, that person will be medically isolated and the health department will be notified. Yet despite these best efforts of jail administrators, an outbreak may still occur given the unique features of Covid-19:
	1. **Covid-19 has an average incubation period of 5.1 days**, which means that a person may not feel the effects of the virus until five days after being exposed to the virus.[[18]](#footnote-18) The CDC reports that symptoms may appear as much as 14 days after exposure.[[19]](#footnote-19) Therefore, if a person is screened by the jail in the early days after exposure, that person could be admitted to general population and come in contact with dozens of people before any symptom is detected.
	2. Because of this long incubation period, people **can carry and spread** the virus **without showing any symptoms**.[[20]](#footnote-20) In fact, “a Massachusetts coronavirus cluster with at least 82 cases was started by people who were not yet showing symptoms, and more than half a dozen studies have shown that people without symptoms are causing substantial amounts of infection.”[[21]](#footnote-21)
	3. COVID-19 can remain viable and spread – even when the infected person is no longer around. “A new analysis found that the virus **can remain viable in the air for up to 3 hours**, on copper for up to 4 hours, on cardboard up to 24 hours and on plastic and stainless steel up to 2 to 3 days.”[[22]](#footnote-22)
	4. New studies suggest that **even young, healthy people could experience a life-threatening progression of symptoms due to *sustained* exposure** to COVID-19. When a symptomatic person shares a confined space with a large number of otherwise healthy people, “super-spreading” could occur due to COVID-19’s ability to replicate the virus faster than an individual immune system could respond to such repeat, extended exposure.[[23]](#footnote-23)
8. **Business as Usual Poses a Danger**. These alarming factors are why scientists and doctors urge “social distancing” – staying six feet or more away from other people – to stop the outbreak.[[24]](#footnote-24) And why West Virginia officials have taken extreme measures to keep people away from large groups.[[25]](#footnote-25) On Friday, March 13th, U.S. District Court Judge Thomas Johnston, Chief Judge of the Southern District of West Virginia entered an order continuing all court operations, including grand jury proceedings and civil and criminal trials.[[26]](#footnote-26) Judge Johnston explained:

 Although there are currently no confirmed cases of COVID-19 in West Virginia, **there is also inadequate testing available at this time to monitor the spread of the disease**, and state officials have taken precautionary measures to close public schools and limit large gatherings in the interest of protecting the public from the spread of the outbreak. Moreover, **West Virginia has a relatively elderly population and high incidence of other medical conditions that can make individuals more vulnerable to the virus**.[[27]](#footnote-27)

One of the largest court systems in the country, Cook County in Chicago, has imposed a 30-day suspension of all criminal case matters with the exception of bail and arraignment hearings.[[28]](#footnote-28)

1. But social distancing is impossible in facilities that are at or near double capacity. Recognizing that “[p]eople locked up right now in West Virginia’s jails and prisons are sitting ducks for infection”, the ACLU of West Virginia “is publicly calling on state officials to immediately consider releasing pre-trial detainees on personal recognizance.”[[29]](#footnote-29) At the federal level, the Chairman of the U.S. House Judiciary Committee requested that the United States Attorney General “consider measures that can be taken to reduce the number of prisoners in government custody.”[[30]](#footnote-30) The Chairman urged federal prosecutors “to not seek the detention of individuals at their initial appearance in court, decline prosecuting minor, non-violent offenses, and decline pursuing supervised release and probation revocations that involve technical and minor violations.”[[31]](#footnote-31)
2. The medical community is in agreement. Dr. Josiah Rich, an epidemiologist who has studied infectious disease in prison systems for decades, says “[t]he most surefire way to avoid a COVID-19 breakout in a correctional facility is to temporarily release incarcerated people.”[[32]](#footnote-32) Homer Venters, former chief medical officer on Rikers Island who helped contain the 2009 H1N1 outbreak inside New York City jails, asserts “one of the most important questions [in responding to COVID-19] is: How can we have fewer people in these places—in jails and prisons?”[[33]](#footnote-33) Iran, “which has recorded alarming death rates from COVID-19 has granted furlough to 54,000 incarcerated men and women to limit the spread in prisons.”[[34]](#footnote-34) One group of doctors explained how releasing inmates is essential to protecting the health of those outside of jails and prisons:

 The abrupt onset of severe covid-19 infections among incarcerated individuals will require mass transfers to local hospitals for intensive medical and ventilator care — highly expensive interventions that may soon be in very short supply. Each severely ill patient coming from corrections who occupies an ICU bed will mean others may die for inability to obtain care.[[35]](#footnote-35)

Human Rights Watch has joined doctors in calling for the release of elderly and medically vulnerable inmates.[[36]](#footnote-36)

1. Unnecessary detention creates an unnecessary ethical dilemma for defense attorneys. Ethical obligations require visits to incarcerated clients, yet defense counsel are “faced with a new dilemma as COVID-19 spreads and routine trips could now mean either transmitting the disease to an already vulnerable population or contracting it themselves.”[[37]](#footnote-37)
2. **Defendant is Particularly Vulnerable**. The Defendant is vulnerable because he is over the age of 60/has a serious medical condition.

 **For these reasons**, the Defendant moves the Court or a bail hearing and an order granting a personal recognizance bond or release on appropriate financial or non-financial conditions.

 Respectfully submitted,

 **CLIENT**, By Counsel

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**CERTIFICATE OF SERVICE**

I, the undersigned, counsel for the Defendant, **CLIENT**, do hereby certify that service of the foregoing *Motion for Bail Hearing and Order Releasing Defendant on Own Recognizance* was made by hand delivery on the [Day of Filing], to the following:

Prosecutor

Kanawha County Prosecuting Attorney Office

301 Virginia Street East

Charleston, WV 25301

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