**STATE OF VERMONT**

**SUPERIOR COURT CRIMINAL DIVISION**

**COUNTY UNIT DOCKET ####-##-## Xxcr**

**STATE OF VERMONT**

**V.**

**FIRSTAND LASTNAME**

**MOTION TO REVIEW BAIL**

NOW COMES Firstand Lastname, by and through counsel, and hereby moves to review bail in light of the COVID-19 pandemic that is likely to strike Vermont’s prisons very soon. Vermont’s bail statutes were written with the many problems of a money-bail system in mind. Among the many problems of pre-trial incarceration is the risk that a defendant will be confined to a prison under circumstances that present a risk to his or her health, in violation of the Eighth Amendment to the United States Constitution. To meet those problems, the Legislature has provided the courts with several non-bail options and required the courts to choose the least restrictive option to mitigate the risk a defendant will make flight from prosecution.

The COVID-19 pandemic will swiftly strike Vermont prisons. Counsel has no confidence that the Department of Corrections is prepared to respond to an outbreak or has the capacity to treat inmates suffering from the common breathing symptoms of COVID-19. Exposing Firstand Lastname to this risk would violate the Vermont bail statutes and the Eighth Amendment to the United States Constitution. Firstand Lastname respectfully requests this Honorable Court strike bail and release him/her/they on conditions of release.

*I. The Department of Corrections is “wholly unprepared” for the COVID-19 epidemic, and the Court should act with urgency to strike bail in this case.*

Dr. Jaimie Meyer is an assistant professor of medicine at the Yale School of Medicine, and she is board certified in internal medicine, infectious diseases, and addiction medicine. See Affidavit of Jaimie Meyer at ¶¶ 1-2 (attached). Her clinical work and research focuses on infectious diseases among people involved with the criminal justice system, both in prison and in the community. Id. ¶ 2. Dr. Meyer has reviewed email correspondence between Corrections Commissioner Baker and concluded based upon her experience in prison healthcare that the Department’s “response to the COVID-19 pandemic is entirely inadequate to protect people in prison and jail in Vermont from being exposed to and infected with COVID-19 and insufficient to prevent a widespread COVID-19 outbreak in [Corrections’] facilities.” Id. ¶ 5. Without additional steps, it is likely that people incarcerated in Corrections’ facilities “will experience high rates of serious illness, including death.” Id.

Dr. Meyer has highlighted four areas in which the Department of Corrections’ response has been inadequate:

1) inadequate screening of visitors and new admissions to the prisons, to include the lack of a quarantine plan for people who screen positive, and the lack of a plan to address correctional officer absenteeism;

2) a lack of prevention techniques, including the inability for inmates to practice social distancing, lack of private sinks, a lack of sanitizers because they contain alcohol, and insufficient cleaning supplies to meet CDC recommendations;

3) a lack of treatment capacity, to include the lack of personal protective equipment (such as masks and gloves), a total absence of Airborne Infection Isolation Rooms in correctional facilities, and the lack of a plan to safely transfer people with COVID-19 to area hospitals; and

4) limited treatment capacity for people with other chronic health conditions in the setting of a COVID-19 pandemic, which is concerning because that population is at higher risk of complications and death if infected.

Affidavit of Jaimie Meyer at ¶ 6. These facts demonstrate that the Department is “wholly unprepared” for the outbreak. Id. ¶ 7.

Dr. Meyer explains that there is a “true urgency” to act on these facts now because when “prison systems are unprepared for pandemics, people in prison experience high rates of morbidity and mortality and there is increased safety risk within facilities and to communities as a whole.” Affidavit of Jaimie Meyer at ¶ 9.

*II. The bail statute requires imposition of the least physically restrictive bail and conditions of release because it is meant the mitigate the problems caused by a money-bail system.*

Vermont’s bail system is meant to strike the right balance between a defendant’s liberty interests and society’s interests in making sure the defendant is present at trial. State v. Hance, 2006 VT 97, ¶ 16, 180 Vt. 357, 910 A.2d 874. The bail statute, 13 V.S.A. § 7554, is the means by which the courts strike that balance. The language of the bail statute and the early decisions of the Vermont Supreme Court interpreting it show that the statute was meant to mitigate the harmful effects of a money-bail system, including detrimental effects on a defendant’s health. The Court should consider the Department of Corrections’ inability to protect a defendant’s health against the COVID-19 pandemic when deciding whether to impose bail.

The bail statute has an express preference for release on recognizance or upon execution of an unsecured appearance bond, meaning most defendants should be released without putting up any money or securities. 13 V.S.A. § 7554(a)(1). Even when release on recognizance or an unsecured appearance bond “will not reasonably mitigate the risk of flight from prosecution[,]” the statute provides:

 the officer shall, either in lieu of or in addition to the methods of release in this section, *impose the least restrictive of the following conditions or the least restrictive combination of the following conditions* that will reasonably mitigate the risk of flight of the defendant as required[.]

Id. The list which follows allows a court to order such things as a remand of custody over the defendant to a designated person, execute security bonds, execute surety bonds, or conditions of release calculated to mitigate the risk of flight. Id. § 7554(a)(1)(A)-(G). Notably, most of the options to mitigate the risk of flight from prosecution do not require a defendant to spend money to secure release.

The Legislature purposely created several non-monetary options to ensure a defendant’s pretrial release. In State v. Webb, the Vermont Supreme Court held that the Legislature had wisely included the non-monetary options to money bail in order to avoid the problems created by a money-bail system. 132 Vt. 418, 420, 320 A.2d 626, 628 (1974). The Court noted that imprisoning a person before trial significantly undercuts the presumption of innocence and hampers the preparation of the accused’s defense. Id.

But the Court’s discussion of the harms of pretrial detention was not limited to presumption of innocence or defense preparation concerns. The Court also cited to State v. Toomey, 126 Vt. 123, 125, 223 A.2d 473, 475 (1966). 132 Vt. at 422, 320 A.2d at 629. In Toomey, the Court discussed the factors Vermont courts considered in setting bail before the enactment of the current bail statutes. Among those factors was the health of the defendant. A court considering imposition of bail, therefore, must consider the effect of pretrial incarceration on a defendant’s health. This is consistent with the broad swath of factors a trial court must consider (but is not limited to considering) when imposing bail, 13 V.S.A. § 7554(a)(1), (b), and the broad discretion the Legislature has given to the courts in imposing bail. State v. Henault, 2017 VT 19, ¶ 4, 204 Vt. 628, 167 A.3d 892.

*III. The dangers of pretrial detention to criminal defendants are thoroughly documented.*

Pretrial incarceration “has profound consequences both within and beyond the criminal justice system.” Paul Heaton, Sandra Mayson, & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 713 (2017). People detained even briefly may lose jobs, housing, or custody of a child. Id. at 714. A detained person’s ability to prepare a defense is hindered by the inability to gather evidence or speak with witnesses, increasing the likelihood of conviction after trial or by plea. Id. Pretrial incarceration may also increase the severity of any sanctions imposed. Id. It can prevent an accused person “from engaging in commendable behavior that might mitigate her sentence or increase the likelihood of acquittal, dismissal, or diversion.” Id. at 722.

Accused persons who are incarcerated pending trial are likely to suffer because, in general, “incarceration in jail negatively impacts the mental and physical health, employment, and family and community interactions of those incarcerated.” Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 Wash. & Lee L. Rev. 1297, 1318 (2012). Jails rarely have adequate resources to treat people with physical or mental problems, and the prison buildings themselves can make people unhealthy. See id. (noting “old and decaying” prison buildings can have dangers such as mold and lead pipes, and are vectors for contagious diseases).

Vermont prisons are no exception, as Dr. Meyer’s affidavit and a recent article about how cost-cutting by the Department of Corrections and the Department of Buildings and General Services lead to guards at the Northeast Regional Correctional Complex getting sick illustrates. Justin Trombley, *‘They’ve been gassing you’: Prison wanted to save energy, instead guards got sick*, Vtdigger.org, Feb. 3, 2020, https://vtdigger.org/2020/02/03/theyve-been-gassing-you-prison-wanted-to-save-energy-instead-guards-got-sick/ [**https://perma.cc/S7E4-HN4Q].** The emotional effects of the criminal process itself can induce “feelings of hopelessness, powerlessness, or despair when faced with the power of the state . . . .” John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants?*, 126 U. Penn. L. Rev. 88, 96 (1977).

*IV. The Eighth Amendment to the United States Constitution protects inmates against unjustifiable risks to the health created by unhealthy prison conditions.*

The Eighth Amendment to the United States constitution protects incarcerated people against unjustifiable risks to their health created by prison conditions. grave risk to [CLIENT’S] health created by the Department’s inadequate response to the current pandemic. This prohibition extends to the states through the Fourteenth Amendment, State v. Venman, Vt. 561, 571, 564 A.2d 574, 581 (1989), and “proscribes more than physically barbarous punishments.” Estelle v. Gamble, 429 U.S. 97, 102, 97 S. Ct. 285, 290, 50 L. Ed. 2d 251 (1976). Most relevant to [CLIENT’S] current situation, the Eighth Amendment protects incarcerated people from prison officials’ “deliberate indifference” to their medical needs and personal safety. Id*.* at 104, 97 S. Ct. at 291.

The United States Supreme Court has applied the deliberate indifference standard to prison officials’ failure to protect incarcerated persons from environmental factors that create an unreasonable risk of future harm to inmates’ health. In Helling v. McKinney, 509 U.S. 25, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993), the Court explicitly held that a showing of current symptoms was not required to establish deliberate indifference in this context. Rather, the Eighth Amendment’s mandate that prisoners be furnished with basic needs, including “personal safety,” necessarily embodies a protection against future harm. Id*.* at 33, 113 S. Ct. at 2480. In so holding, the Court approvingly cited Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974), for the proposition that one such threat to personal safety includes “the mingling of inmates with serious contagious diseases with other prison inmates.”Helling, 509 U.S. at 34, 113 S. Ct. at 2481.

*V. The COVID-19 pandemic puts incarcerated persons at enormous unjustifiable risks and requires striking bail.*

  The Vermont Department of Corrections is not prepared for this pandemic. It does not have a plan to prevent infections, and it does not have the resources or capacity to put a plan into place. It does not have the medical facilities to treat people infected with this virus. This itself runs afoul of the Department’s obligations under the Eighth Amendment and requires a reexamination of bail in this case.

The potential human cost of the Department’s unpreparedness is staggering. Inmates may die from preventable infections, or they may die from inadequate and inferior treatment. Inmates who survive the pandemic with suffer needlessly.

Inmates who are not infected will not necessarily be spared. They will removed physically from ailing family members. They will not be able to comfort parents and grandparents who contract COVID-19 and who face the life-threatening consequences of the disease. They will not be present to care for loved ones whose lives are not threatened by the disease, but who nonetheless become very ill. They will not be able to care for their sick children.

They will not be able to work, and they may be fired from their jobs. Without work, they will lose their health insurance and other benefits that are necessary to fight this disease. They may lose their homes, subjecting loved ones to homelessness during this period of pandemic. An eager juvenile justice system may take their children from them.

*IV. [Discuss your client’s situation and any other helpful facts that will convince the judge to grant bail].*