

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :  
 :  
v. :  
 :  
PEDRO HERNANDEZ, : Case No. 19 Cr. 169 (VM)  
 :  
Defendant. :  
 :  
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**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRETRIAL RELEASE OF  
DEFENDANT PEDRO HERNANDEZ**

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We respectfully submit this memorandum of law in support of our motion for the release of defendant Pedro Hernandez on bond pending trial. In light of the threat posed by COVID-19 to Mr. Hernandez's health, we request that the Court either release Mr. Hernandez without a hearing or hold a hearing as soon as possible. We consent to appearing by teleconference. We have asked our client via the BOP's Corrlinks system to confirm he will waive his appearance at any hearing on this matter and will advise the Court as soon as we receive a response.

### **PRELIMINARY STATEMENT**

Mr. Hernandez, who is 64 years old and suffers from asthma and high blood pressure, is in the high-risk category for COVID-19 as defined by the Centers for Disease Control.<sup>1</sup> Since January 2019, he has been incarcerated in MCC New York, where he is now housed in a shared dorm space with more than 20 other at-risk inmates, all of whom share a single toilet and shower. Earlier this week, the Bureau of Prisons disclosed that an MCC inmate – who was living in the same unit as Mr. Hernandez – had tested positive for COVID-19. We learned earlier today that another inmate in the same unit has apparently tested positive. The available evidence and the experts tell us that the virus will soon sweep through the rest of the unit and then the prison, infecting many and killing the most vulnerable. In light of the COVID-19 crisis, courts in this District and around the nation have granted temporary pretrial release to vulnerable inmates – like Mr. Hernandez – who pose no threat to the physical safety of the community. Indeed, in the state system, even the District Attorneys of New York County and in Brooklyn, recognizing the urgency of the situation, have recommended that courts do so.

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<sup>1</sup> Yesterday, we learned that Mr. Hernandez has been identified by the MCC itself as a vulnerable inmate under CDC guidelines.

Mr. Hernandez has lived in New York City for over thirty years and has family here, including a 36-year-old daughter, who lives in the Bronx with her husband and two small children. He is charged with a non-violent offense (a narcotics conspiracy carrying no mandatory minimum sentence) and seven other members of the alleged conspiracy (three of whom, unlike Mr. Hernandez, have pleaded guilty, and one of whom has been sentenced) have been out on bond for more than a year, without incident. Pretrial supervision and other conditions can be fashioned to address any concerns that the government may have about Mr. Hernandez's appearance for future proceedings and there is no risk of danger to the community. Accordingly, as set forth further below, he should be released from custody, either pursuant to 18 U.S.C. § 3142(i) (which permits the Court to temporarily release defendants, subsequent to entering an order of detention, for "compelling reasons"), or § 3142(f) (which permits the Court to reopen a detention hearing in the event of changed circumstances).

The Court appointed the undersigned to represent Mr. Hernandez two weeks ago. As a result of the COVID-19 crisis and the additional restrictions now in place at the MCC, we have been severely hampered in our ability to communicate with Mr. Hernandez and to reach his daughters or other family members who might be able to provide a place for him to reside. We are thus at this time unable to present co-signers or offer the residence of a family member as part of a proposed bond package. Given the severity of the growing crisis and the danger to Mr. Hernandez, this should not preclude his release. Indeed, courts in this District and in the Eastern District of New York have released defendants like Mr. Hernandez on condition that they reside in New York City homeless shelter system, under the supervision of Pretrial Services, until other arrangements can be found. We respectfully ask that the Court do the same here.

Releasing Mr. Hernandez is also necessary to ensure to protect his right to counsel during the course of the COVID-19 crisis, particularly as trial, presently scheduled for the week of June 22, 2020, approaches. The difficulties we have had communicating with Mr. Hernandez will not resolve for the foreseeable future. Should he remain incarcerated, counseling Mr. Hernandez regarding plea discussions and preparing for trial will be extraordinarily difficult, if not impossible. If he is released, Mr. Hernandez will enjoy greater access to counsel, which will in turn promote the efficient and just resolution of this case. And if trial is delayed in light of the crisis, Mr. Hernandez, who is of course presumed innocent, will at least not be incarcerated during that delay.

## **BACKGROUND<sup>2</sup>**

### **I. The Coronavirus Crisis**

As the Court is well aware, New York is in the midst of an unprecedented public health crisis that grows increasingly dire each day. Less than two weeks after New York State reported its first case of COVID-19, the statewide tally had grown to 325 cases of infection. In a five-day period between March 15 and March 20, New York State experienced a ten-fold increase in new confirmed cases of COVID-19.<sup>3</sup> As of this writing, there are close to 45,000

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<sup>2</sup> In this section and elsewhere in this memorandum, we have drawn on the submissions of and materials supplied by other defense counsel, most notably the Federal Defenders, who have been seeking the release of similarly situated clients from the MCC and MDC.

<sup>3</sup> Lazaro Gamio, *et al.*, *Watch How the Coronavirus Spread Across the United States*, N.Y. Times (Mar. 21, 2020), <https://www.nytimes.com/interactive/2020/03/21/us/coronavirus-us-cases-spread.html>.



confirmed cases of the virus, more than half of which are in New York City, and 519 deaths.<sup>4</sup> New York City is now the epicenter of the U.S. pandemic.<sup>5</sup>

On March 7, 2020, Gov. Andrew Cuomo declared a State of Emergency in New York State.<sup>6</sup> On March 12, 2020, Mayor Bill de Blasio declared a State of Emergency in New York City, banning gatherings of more than 500 people.<sup>7</sup> On March 20, 2020, Governor Cuomo directed all non-essential workers to work from home, requiring individuals to maintain six feet of distance between each other.<sup>8</sup> The same day, the Federal Emergency Management Agency (FEMA) issued a “major disaster” declaration for New York.<sup>9</sup>

The Centers for Disease Control have identified two groups of people at higher risk of contracting and succumbing to COVID-19: adults over 60 years old and people with chronic medical conditions.<sup>10</sup> Mr. Hernandez is in both categories, as he is 64 and has asthma

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<sup>4</sup> Chas Danner, *et al.*, *Coronavirus in New York: Latest Updates*, New York Magazine (Mar. 27, 2020), <https://nymag.com/intelligencer/2020/03/new-york-coronavirus-cases-updates.html>.

<sup>5</sup> Jesse McKinley, *Coronavirus in N.Y.C.: Region Is Now an Epicenter of the Pandemic*, N.Y. Times (Mar. 23, 2020), <https://www.nytimes.com/2020/03/22/nyregion/Coronavirus-new-York-epicenter.html?action=click&module=Spotlight&pgtype=Homepage>.

<sup>6</sup> *At Novel Coronavirus Briefing, Governor Cuomo Declares State of Emergency to Contain Spread of Virus*, Office of the Governor of N.Y. (Mar. 7, 2020), <https://on.ny.gov/2TKzIoz>.

<sup>7</sup> *DeBlasio Declares State of Emergency in NYC, and Large Gatherings Are Banned*, N.Y. Times (Mar. 12, 2020), <https://www.nytimes.com/2020/03/12/nyregion/coronavirus-new-york-update.html>.

<sup>8</sup> *Novel Coronavirus (COVID-19)*, N.Y. State Dept. of Health (Mar. 21, 2020), at <https://on.ny.gov/2vfFQvy> (last visited Mar. 28, 2020, updating regularly).

<sup>9</sup> *President Donald J. Trump Approves Major Disaster Declaration for New York*, Federal Emergency Management Agency (Mar. 20, 2020), <https://www.fema.gov/news-release/2020/03/20/president-donald-j-trump-approves-major-disaster-declaration-new-york>.

<sup>10</sup> The information in this paragraph is in part drawn from the Affidavit of Jonathan Giftos, M.D., (“Giftos Affidavit”) the Medical Director, Addiction Medicine & Drug User Health at

and high blood pressure. The CDC has concluded that “[p]eople with asthma may be at higher risk of getting very sick from COVID-19,” as “COVID-19 can affect your respiratory tract (nose, throat, lungs), cause an asthma attack, and possibly lead to pneumonia and acute respiratory disease.”<sup>11</sup> The Harvard Medical School’s Coronavirus Resource Center states that older people with high blood pressure are “more likely to have severe disease or death from COVID-19.”<sup>12</sup>

COVID-19 is substantially more dangerous to persons in these high-risk groups than to the general population.<sup>13</sup> Older people who contract COVID-19 are more likely to die than people under the age of 60.<sup>14</sup> In a February 29, 2020 WHO-China Joint Mission Report, the preliminary mortality rate analyses showed that individuals age 60-69 had an overall 3.6% mortality rate and those 70-79 years old had an 8% mortality rate.<sup>15</sup> Older people diagnosed with COVID-19 are more likely to be very sick and require hospitalization to survive because the acute symptoms include respiratory distress, cardiac injury, arrhythmia, septic shock, liver

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Project Renewal and a Clinical Assistant Professor in the Department of Medicine at Albert Einstein College of Medicine. The affidavit, which is attached hereto as Exhibit A, was prepared under the supervision of lawyers at Federal Defenders, to be submitted in connection with bail applications by vulnerable inmates at the MCC.

<sup>11</sup> *Coronavirus Disease 2019 (COVID-19)*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/asthma.html> (last visited Mar. 28, 2020, updating regularly).

<sup>12</sup> *Coronavirus Resource Center*, Harvard Medical School, <https://www.health.harvard.edu/diseases-and-conditions/coronavirus-resource-center> (last visited Mar. 28, 2020, updating regularly).

<sup>13</sup> Giftos Aff. ¶¶ 9-10.

<sup>14</sup> *Id.* ¶ 10.

<sup>15</sup> *Id.*

dysfunction, kidney injury and multi-organ failure. Access to a mechanical ventilator is often required.<sup>16</sup>

## II. The Crisis in Our Prisons

Correctional settings increase the risk of contracting an infectious disease, like COVID-19, due to the high numbers of people with chronic, often untreated, illnesses housed in a setting with minimal levels of sanitation, limited access to personal hygiene, limited access to medical care, and no possibility of staying at a distance from others.<sup>17</sup> Correctional facilities house large groups of inmates together, and move inmates in groups to eat, do recreation, and go to court. They frequently have insufficient medical care for the population, and, in times of crisis, even those medical staff cease coming to the facility. Hot water, soap and paper towels are frequently in limited supply. Inmates, rather than professional cleaners, are responsible for cleaning the facilities and often not given appropriate supplies. This means there are more people who are susceptible to getting infected all congregated together in a context in which fighting the spread of an infection is nearly impossible.<sup>18</sup>

The rapid spread of coronavirus within prisons in other countries grimly foreshadows what lies ahead for New York. In China, the coronavirus spread at a rapid pace through prisons in Wuhan, surging to 806 cases by February 29, 2020.<sup>19</sup> Secretary of State Mike Pompeo has called for Iran to release Americans detained there because of the “deeply troubling”

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* ¶ 11.

<sup>18</sup> *Id.*

<sup>19</sup> Zi Yang, *Cracks in the System*, The Diplomat (Mar. 9, 2020), <https://thediplomat.com/2020/03/cracks-in-the-system-covid-19-in-chinese-prisons/>.

“[r]eports that COVID-19 has spread to Iranian prisons,” noting that “[t]heir detention amid increasingly deteriorating conditions defies basic human decency.”<sup>20</sup> After courts across Iran granted furlough to tens of thousands of inmates as part of the measures to contain coronavirus across the country, Secretary Pompeo observed that the furloughs demonstrated Iran’s “ability to grant clemency and show mercy.”<sup>21</sup> In Italy, extended lockdowns in the prison system due to COVID-19 have sparked riots in prisons across the country.<sup>22</sup>

In light of particular risks posed in prisons, leaders in this city and around the country have called for a reassessment of the need for pretrial detention in many cases. On March 20, 2020, the New York City Bar Association released a statement urging “local, state and federal authorities to take steps to lower the number of individuals incarcerated in New York State in an effort to prevent the spread of COVID-19 through our jail and prison system.”<sup>23</sup> With regard to the federal system, the statement recommended that “[f]ederal trial judges [] consider utilizing their authority under 18 USC § 3142(i) to grant ‘temporary release’ to people for a ‘compelling reason’ during the duration of this health crisis.”<sup>24</sup>

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<sup>20</sup> Kylie Atwood and Jennifer Hansler, *Pompeo Calls for Humanitarian Release of Wrongfully Detained Americans in Iran Amid Coronavirus Outbreak*, CNN (Mar. 10, 2020), <https://www.cnn.com/2020/03/10/politics/mike-pompeo-iran-release-detained-americans-coronavirus/index.html>.

<sup>21</sup> *Id.*

<sup>22</sup> Christina Carrega, *Inmates revolt after Italian prisons restrict visitors due to coronavirus concerns*, ABC News (Mar. 11, 2020), <https://abcnews.go.com/International/inmates-revolt-italian-prisons-restrict-visitors-due-coronavirus/story?id=69539760>.

<sup>23</sup> Prisoner Release Guidance Statement, New York City Bar Ass’n (Mar. 20, 2020), [https://s3.amazonaws.com/documents.nycbar.org/files/COVID19\\_Prisoner\\_Release\\_Guidance\\_Statement\\_FINAL.pdf](https://s3.amazonaws.com/documents.nycbar.org/files/COVID19_Prisoner_Release_Guidance_Statement_FINAL.pdf)

<sup>24</sup> *Id.*

On March 25, 2020, a letter issued by District Attorney's offices around the country, including those in New York County and Kings County, underscored the urgency of the situation, observing that if our prisons "become breeding grounds for the coronavirus, it will not only impact those incarcerated, but our entire community."<sup>25</sup> The letter went on to say that "the current crisis creates an even more pressing need for elected prosecutors, public health officials, and other leaders to work together to implement concrete steps in the near-term to dramatically reduce the number of incarcerated individuals and the threat of disastrous outbreaks." Among the prosecutors' recommendations was that all elderly or other at-risk inmates be released unless they pose a serious risk to the physical safety of the community.<sup>26</sup>

### III. Lack of Preparedness and Dire Conditions at the MCC

MCC New York has proven that it is unable to protect the health and safety of defendants in its custody, and is in the process of antagonizing the health crisis in our community.<sup>27</sup> It is a massive, overcrowded pretrial detention facility, housing 750 people in a building designed to house 474 inmates.<sup>28</sup> The majority of inmates are held in small two-man cells with a shared toilet and sink, and eat meals and have recreation in groups of 70 or more. Other units are open dormitories that house 70 or more inmates without the ability to separate. The medical care at the MCC has repeatedly failed to adequately address even routine medical

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<sup>25</sup> Joint Statement from Elected Prosecutors on Covid-19 (Mar. 25, 2020), <https://fairandjustprosecution.org/wp-content/uploads/2020/03/Coronavirus-Sign-On-Letter.pdf>

<sup>26</sup> *Id.*

<sup>27</sup> Giftos Aff. ¶¶ 14-17.

<sup>28</sup> *Id.* ¶ 15.

conditions such as diabetes, pregnancy, and anemia.<sup>29</sup> In times of crisis, medical care has halted entirely.

Earlier this month, the MCC demonstrated an inability to appropriately care for inmates. For eight days, every inmate endured a full lockdown, without access to family members or attorneys, while law enforcement searched for a loaded gun brought into the facility by a correctional officer.<sup>30</sup> Federal Defenders of New York clients reported to attorneys that mice and water bugs ran through the units as guards unblocked holes in walls and vents that inmates had stuffed with clothing to prevent pests. Inmates on one unit were forced to share one toilet among twenty-six people, and prevented from washing their clothing: prime conditions for the spread, rather than containment, of infectious disease. On other units, toilets overflowed in two-man cells, spreading raw sewage. Inmates with serious medical conditions, including AIDS and anemia, were denied medications or medical care. Female inmates were denied feminine hygiene supplies. No clean drinking water was provided; inmates were forced to drink from their bathroom sinks, from which brown water often ran.

Up until two weeks ago, the MCC had not met even the most basic recommendations of the CDC for preventing the spread of the COVID-19, having received no guidance from the BOP on screening or treatment. The prison had no screening mechanism in place for staff or visitors, other than self-reporting, and lacked even a sign advising people who have traveled to the highest-risk countries not to enter. Staff were not wearing face masks or

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<sup>29</sup> See, e.g., Nat'l Association of Women Judges (NAWJ) Women in Prison Committee (WIP) Second Visit to BOP's Metropolitan Detention Center (MDC), Brooklyn, N.Y. (June 3, 2016), <https://bit.ly/39JRhdW>.

<sup>30</sup> See Stephen Rex Brown, *Strip Searches, Frozen Bologna Sandwiches and Wrecked Cells: MCC Inmates Detail Lockdown Due to Smuggled Gun*, N.Y. Daily News (Mar. 6, 2020), <https://bit.ly/2xqbgjw>.

gloves. The MCC had no hand sanitizer available, and no soap, hot water, or paper towels in the visitors' bathroom. Nor did the MCC have any testing for COVID-19 available, and staff did not know when, if ever, it would have tests.

On March 13, 2020, in response to the growing crisis, the BOP announced that it would suspend all social and legal visits for 30 days and implement screening for new inmates. It remains unclear what additional precautions the MCC has taken. There is no separate medical unit or facility for ill inmates, and during weekdays there are only two doctors available to care for all 750 inmates.<sup>31</sup> There are no doctors on weekends.

On March 24, 2020, the MCC disclosed that an inmate had tested positive for COVID-19, and that the inmate had, to that point, been housed in the same unit where the MCC's high-risk population had been confined (cell block 11 South) – a dorm-like setting where the old and infirm, including Mr. Hernandez, had been moved.<sup>32</sup> On March 26, 2019, we learned that Mr. Hernandez continues to be housed with approximately 20 other inmates, all of whom are considered high-risk by the CDC, in 11 South. The entire cell block shares one urinal, one toilet, and one shower. On March 27, 2019, we were advised by other defense counsel that another inmate held in 11 South had tested positive for COVID-19. In addition to being 64 years old, Mr. Hernandez also reports that he suffers from asthma and high blood pressure, putting him at even greater risk of serious illness or death from COVID-19. Mr. Hernandez takes several

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<sup>31</sup> Giftos Aff. ¶ 16(b).

<sup>32</sup> An inmate at MDC Brooklyn has also tested positive for the virus. *See* Bureau of Prisons: COVID-19 Update, Fed. Bureau of Prisons, <https://www.bop.gov/coronavirus> (last updated Mar. 26, 2020).

medications for these conditions, including amlodipine, hydrochlorothiazide, and aspirin, for his high blood pressure, and an inhaler for his asthma.

IV. Lack of Attorney-Client Access

The BOP's lack of preparedness for this crisis and the measures it has taken since March 13 have severely prejudiced Mr. Hernandez's Sixth Amendment right to counsel.

Attorney visits have been shut down – while the BOP's stated policy is that it may grant them on a limited, discretionary basis, we are not aware of any such visits being granted at the MCC or MDC to date. Phone calls have been permitted only on a discretionary basis, and cannot be scheduled in advance – if the BOP decides to grant a call request, counsel is contacted without notice and expected to be available on the spot. While we had some success reaching Mr. Hernandez in this manner earlier this week, each time, a long line of inmates stood behind him and we were able to speak for no more than 15 minutes per call.<sup>33</sup> Mr. Hernandez is not a native English speaker, making communication even more difficult under the circumstances.

V. Charged Offense and Bail Status of Other Defendants

Mr. Hernandez is charged with a single count of conspiring to sell narcotics, pursuant to 21 U.S.C. §§ 846 and 841(b)(1)(c). He faces no mandatory minimum sentence. While we were appointed to this case two weeks ago and just recently received discovery, it appears that the principal evidence against Mr. Hernandez consists of video recordings of two undercover narcotics purchases, allegedly from Mr. Hernandez. The face of the individual said to be selling the narcotics is not clearly visible in the video, and it is certainly not clear that the individual is Mr. Hernandez. According to the lab reports produced by the government, the total

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<sup>33</sup> We have been advised that arrangements are being made to permit video-conferencing from the MCC to the courthouse. As we understand it, such conferences will only be permitted on a limited basis, at BOP's discretion – 4 or 5 per day, in 30 or 60-minute slots. No video-conferencing will be available for any inmate who has been quarantined.



amount of narcotics allegedly sold by Mr. Hernandez in connection with the two transactions amounts to less than one gram of heroin.

Mr. Hernandez was arrested in this matter upon a complaint charging eight other defendants as participants in the same conspiracy. Dkt No. 1, *United States v. Dones, et al.*, 19-CR-169 (VM) (S.D.N.Y.). Seven of those defendants were released shortly following their presentment, on personal recognizance bonds including a variety conditions, including co-signors and in certain cases, home detention and electronic monitoring. At least three of these defendants remained out on bond, with the government's consent, following their guilty pleas, including defendants Alberto Paillot and Angela Bosquez. Mr. Paillot was permitted to remain at liberty despite pleading guilty to a superseding information charging him with a count carrying a five-year mandatory minimum sentence. Dkt Nos. 104, 110. Ms. Bosquez remains at liberty pending her sentence, despite the fact that she stipulated to a Sentencing Guidelines range of 151 to 188 months imprisonment, which suggests that she is a career offender under the Guidelines.<sup>34</sup> Dkt No. 130, at 18; *see also* U.S.S.G. 4B1.1. A third defendant, Edward Torres, is at liberty after pleading guilty to an agreement which includes a stipulated two-point leadership enhancement, indicating that the government believes him to be among the leaders or supervisors of the charged conspiracy. Dkt No. 157, at 6.

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<sup>34</sup> We understand that the government takes the position that Mr. Hernandez, as the result of prior narcotics convictions, is also a career offender and would be subject to the same advisory Guidelines range as Ms. Bosquez were he to plead guilty.

## ARGUMENT

### I. Mr. Hernandez Should Be Released on Bond Pending Trial

#### A. Legal Standard

##### 1. Basis for Release under the Bail Statute

At least two provisions of the bail statute require Mr. Hernandez’s release on bond in light of the current crisis. First, 18 U.S.C. § 3142(i)(4) provides that, subsequent to issuing a detention order, a judicial officer may permit the temporary release of a defendant, “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.” Over the last two weeks, numerous courts in this District have found that the COVID-19 crisis and/or the BOP’s cancellation of visitation can constitute “compelling” reasons under the statute, and have temporarily released defendants on this basis, for example:

- *United States v. Stephens*, 15-CR-95 (AJN) (S.D.N.Y. Mar. 19, 2020) (Dkt. No. 2798). Judge Nathan ordered the release of the defendant, who had been denied bail two weeks earlier after his arrest for allegedly possessing a loaded firearm in close proximity to narcotics in violation of the terms of his supervised release. Judge Nathan found that “the obstacles the current health crisis poses to the preparation of the Defendant’s defense constituted a compelling reason under 18 U.S.C. § 3142(i),” noting that the “spread of COVID-19 throughout New York State—and the country—has compelled the BOP to suspend all visits—including legal visits, except as allowed on a case-by-case basis—until further notice.” *Id.* at 5.
- *United States v. Brandon*, 19-CR-644 (GBD) (S.D.N.Y. Mar. 24, 2020) (Dkt. No. 23). Judge Daniels ordered the temporary release pursuant to 18 U.S.C. § 3142(i) of the defendant, who was in the high-risk category for COVID-19, finding that the crisis and the defendant’s vulnerability to infection constituted “compelling circumstances” under the statute. The government had opposed bail on the ground that the defendant was a “serial violator” of the law, who had previously absconded from a halfway house. (Dkt. No. 19 at 1-2).
- *United States v. Perez*, 19-CR-297 (PAE) (S.D.N.Y. Mar. 19, 2020) (Dkt. No. 62). Judge Engelmayer ordered the temporary release pursuant to 18 U.S.C. § 3142(i) of the defendant, who was in the high-risk category for COVID-19, finding that the crisis and the defendant’s vulnerability to infection constituted “compelling circumstances” under the statute. The

government opposed bail on the ground that the defendant (i) had previously absconded from pretrial release and been remanded, having cut off his ankle bracelet; (ii) was facing a 10-year mandatory minimum sentence for enticing a minor, as well as child pornography charges; and (iii) had previously used at least six different aliases, seven different dates of birth, and nine different social security numbers. (*Id.* at Dkt. No. 59).

- *United States v. Witter*, 19-CR-568 (SHS) (S.D.N.Y Mar. 26, 2020) (Dkt. No. 40). Judge Stein agreed to the release of the defendant under 18 U.S.C. 3145(c), a provision in the bail statute providing for the release under “exceptional circumstances” for defendants who have pleaded guilty and are awaiting sentencing. The defendant was incarcerated at MCC, having pleaded guilty to a narcotics conspiracy in which the defendant had brokered the sale of five kilograms of cocaine. Judge Stein found that the defendant, who was in the high-risk category for COVID-19 due to his age (57) and the fact that he was on medication for hypertension, had established “exceptional reasons” warranting his release pending sentencing. Judge Stein wrote, “The Court finds that defendant has established exceptional reasons warranting his release pending sentencing. COVID-19 presents an unprecedented public health crisis. Now that the virus has infiltrated the Metropolitan Correctional Center, both Witter’s age and medical condition elevate his risk of complications from the virus.” (*Id.* at 2) (citation omitted).

Courts have also ordered the release of defendants, like Mr. Hernandez, who are subject to previously entered detention orders, on the grounds that the risks presented by the COVID-19 crisis constitute “changed circumstances” under 18 U.S.C. § 3142(f).<sup>35</sup> In *Stephens*, described above, Judge Nathan found this to be an alternative ground for release, concluding that “the unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic has become apparent.” *Stephens*, 15-CR-95, Dkt. No. 2798, at 2. Importantly, Judge Nathan reached this conclusion *prior to* BOP’s disclosure that inmates in both the MDC and the MCC has tested positive for COVID-19, writing that “[a]lthough there is not yet a known outbreak among the jail and prison populations, inmates may be at a heightened risk of contracting

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<sup>35</sup> Title 18, United States Code, Section 3142(f) provides, in relevant part, that a detention hearing “may be reopened, before or after a determination by the judicial officer, at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of such person as required and the safety of any other person and the community.”

COVID-19 should an outbreak develop.” *Id.* In particular, Judge Nathan noted that the crisis required a reassessment of the prospect that release of the defendant would pose a danger to the community, finding that a “comprehensive view of the danger the Defendant poses to the community requires considering all factors—including this one—on a case-by-case basis.” *Id.* at 3. The Court cited a recent decision in the Eastern District of New York relying on the same rationale to release a defendant from detention in the MDC and observing that “[t]he more people we crowd into [the MDC], the more we’re increasing the risk to the community”. *Id.* (citing *United States v. Raihan*, No. 20-cr-68 (BMC) (JO), Dkt. No. 20 at 10:12–19 (E.D.N.Y. Mar. 12, 2020)).

2. Access to Counsel under the Sixth Amendment

A prison violates the Sixth Amendment when it “unreasonabl[y] interfere[s] with the accused person’s ability to consult counsel.” *Benjamin v. Fraser*, 264 F.3d 175, 185 (2d Cir. 2001). Unreasonable interference requires a showing far less alarming than the one present here. In *Benjamin*, the Second Circuit held that New York City correctional facilities violated the right to counsel when defense attorneys “routinely face[d] unpredictable, substantial delays in meeting with clients” and were “forced to wait between 45 minutes and two hours, or even substantially longer, after arriving at a facility to see a client.” *Benjamin*, 264 F.3d at 179. Similarly, in *Wolfish v. Levi*, the Second Circuit held that the Westchester County Jail “severely constrained” an inmate’s “access to legal counsel” where dedicated attorney visiting hours were limited to two hours a day, and most attorney visits were “made in the general visiting rooms during visiting hours thereby entailing long delays, limiting the attorney’s time with his client, and totally vitiating confidentiality.” 573 F.2d 118, 133 (2d Cir. 1978), rev’d on other grounds, 441 U.S. 520 (1979).

Just last week, the Second Circuit underscored the importance of ensuring access to counsel during pretrial detention, in *Federal Defenders of New York v. Bureau of Prisons*, 19-1778, Dkt. No. 87-1 (2d. Cir. Mar. 20, 2020). At issue in that case were the cancellations and delays of attorney visits by MDC Brooklyn in January 2019, during a government shutdown and subsequent power outage. In vacating the district court's decision dismissing the complaint, the Court wrote, "The right to consult with legal counsel about being released on bond, entering a plea, negotiating and accepting a plea agreement, going to trial, testifying at trial, locating trial witnesses, and other decisions confronting the detained suspect, whose innocence is presumed, is a right inextricably linked to the legitimacy of our criminal justice system." (*Id.* at 25).

As noted, a court can grant pretrial release to a defendant under 18 U.S.C. 3142(i) to protect his or her ability to prepare a defense, and courts have in fact done so in light of the unprecedented measures implemented by BOP during the current crisis. *See supra* at 13 (citing *Stephens*, 15-CR-95).

B. Analysis

The threat to Mr. Hernandez's health, and indeed his life, is clear and imminent. As a 64-year-old man with asthma and high blood pressure, he is at great risk of becoming seriously ill if infected by COVID-19. He is confined in unsanitary, close quarters with more than 20 other high-risk inmates, including at least two who have tested positive for COVID-19. Unless Mr. Hernandez is released, he will continue to be held in these conditions, sharing one toilet and shower with the rest of the cell block, with minimal access to healthcare. Should he show signs of infection, the MCC lacks medical isolation units, and Mr. Hernandez will likely be confined to solitary confinement in the Special Housing Unit, where sanitary conditions are reportedly even worse, and where he will be entirely cut off from the outside world, including counsel. As an older, non-violent offender, Mr. Hernandez is precisely the type of person that

should be released in this crisis, as the legal community works collaboratively – for everyone’s benefit – to reduce the prison population and slow the spread of the virus. As noted, this is a proposition with which even the District Attorney’s Offices in New York and Brooklyn agree.

The threat to Mr. Hernandez’s ability to prepare a defense, and to discuss his case with counsel, including plea negotiations, is equally evident. The status quo – sporadic, 15-minute calls with counsel – clearly does constitute adequate access to counsel under the Sixth Amendment. We are doubtful that the limited video conferencing capability presently contemplated will suffice to meet the constitutional standard either. It is accordingly critical that Mr. Hernandez be released, and it is clear that sufficient conditions can be crafted – as they have been in many other cases over the past two weeks where the risk of flight and danger to the community is far greater than it is here – to assure Mr. Hernandez’s appearance and the safety of the community.

We anticipate that the government will raise several arguments in opposition to this motion, which we address below.

1. Flight Risk

Mr. Hernandez has roots in this community, having moved to the United States from Cuba as a young man, forty years ago, in 1980. After briefly living in New Jersey, he moved to New York City in the 1985, where he has lived ever since. Mr. Hernandez has a 36-year-old daughter, who has lived in Bronx, New York for at least 15 years, and now resides with her husband and two small children. While we have been unable to reach her, Mr. Hernandez believes that his daughter has been employed for several years at a Fedex or similar mail-delivery store. Mr. Hernandez has at least one other daughter, 32 years old, who lives with her husband and three small children in Allentown, Pennsylvania. Both daughters are U.S. citizens.

Mr. Hernandez has not been to Cuba in 40 years, and there is no risk that he will return there. Despite prior encounters with the criminal justice system (including a state prison sentence), he has never sought to flee this country and ICE has never sought to deport him. The government advises that there is presently no ICE detainer lodged against him.

Lack of legal immigration status should not and has not precluded release in the midst of this crisis. In two recent decisions in this District, Judge Nathan and Judge Torres ordered the release of detainees from ICE detention facilities largely on their own recognizance and with electronic monitoring or other forms of supervision, finding that ICE was unable to adequately protect them during the present coronavirus outbreak. *See Basank et al. v. Decker*, No. 20-cv-02518 (AT) Dkt. No. 11 (S.D.N.Y. March 26, 2020); *Coronel et al. v. Decker*, No. 20-cv-02472 (AJN) Dkt. No. 26 (S.D.N.Y. March 27, 2020). Like Mr. Hernandez, each of the released detainees suffered from a chronic medical condition (including asthma and high blood pressure) that put them at increased risk for death or serious injury if exposed to COVID-19 while detained, and in all but one of the facilities where Petitioners were detained, either staff members or other detainees had tested positive for COVID-19. Writing in *Basank*, Judge Torres noted that the conditions at the detention centers at issue posed “excessive risks to [the detainees’] health,” as the detainees could not follow the CDC’s recommendation to remain six feet apart from one another, and ICE had demonstrated no efforts to protect vulnerable detainees. *Basank*, No. 20-cv-02518, Dkt. No. 11, at 12-13. In *Coronel*, Judge Nathan found that continued incarceration for the detainees was a violation of their Fifth Amendment due process rights, as doing so demonstrated deliberate indifference to their serious, unmet medical needs. *Coronel*, 20-cv-02472, Dkt. No. 26.

At Mr. Hernandez's initial bail hearing in this case on January 9, 2019, the government claimed that Mr. Hernandez has a history of parole violations, bench warrants, and providing aliases to the police. Dkt. No. 87 at 6-7. A close review of Mr. Hernandez's rap sheet reflects that the government overstated the extent of this history and its bearing on the flight risk determination. The rap sheet reflects that Mr. Hernandez's parole was revoked more than 12 years ago, in connection with a drug possession charge, not as a result of an attempt to flee. While the rap sheet indicates that bench warrants have issued previously for Mr. Hernandez in state proceedings, the most recent warrant – issued December 4, 2018 – appears to have issued the same day Mr. Hernandez was arraigned in another drug possession case, strongly suggesting that his failure to appear was not a volitional act, but rather the result of his arrest. This conclusion is reinforced by the fact that, according to the rap sheet, the court permitted Mr. Hernandez to remain at liberty on his own recognizance. Another bench warrant, issued January 4, 2017 in a misdemeanor petty larceny case, was vacated five days later. All other bench warrants were issued decades ago, in the 1980s or 1990s. The only "alias" Mr. Hernandez has allegedly given in the last 25 years is the name "Carlos Hernandez," more than 10 years ago.

In any event, in light of the extraordinary circumstances presented by the COVID-19 crisis, courts have granted temporary release to defendants who have presented a far greater risk of flight than Mr. Hernandez, including defendants who have, among other things, previously cut off their ankle bracelets and escaped from halfway houses. *See supra* at 13-14 (citing *Perez* and *Brandon*). To the extent the Court believes it necessary, it can require location monitoring, a curfew, or other supervisory conditions as part of the terms of release.

2. Dangerousness

At the January 9, 2019 bail hearing, the government also opposed release on the ground that Mr. Hernandez presented a danger to the community, claiming that the charged



conspiracy had led to a number of fatal and nonfatal overdoses in the neighborhood around where the drugs were sold. Dkt. No. 87 at 10. Of course, this same argument could be made with regard to any of the seven other defendants who the government agreed to release on bond, including Edward Torres, who the government apparently views as a leader of the conspiracy. *See supra*, at 12. In any event, the alleged conspiracy ended well over a year ago with the takedown in this case, and even accepting the government's allegations, any risk that Mr. Hernandez would rejoin the scheme that existed in January 2019 no longer exists today. That likelihood is made even more remote by the fact that if Mr. Hernandez is released, he will, in light of the COVID-19 crisis, be for the most part confined indoors, and subject to Pretrial supervision.

With regard to the evidence of Mr. Hernandez's participation in this conspiracy, as noted, the government has produced video recordings of two transactions allegedly showing Mr. Hernandez selling to an undercover officer a total of one gram of heroin.<sup>36</sup> While we do not gainsay the seriousness of narcotics trafficking in any amount, Mr. Hernandez is accused of being a street-level dealer in small quantities of drugs, conduct far less serious than that at issue in *Witter*, where Judge Stein ordered the release of a defendant who had already pleaded guilty to personally brokering the sale of five kilograms of cocaine. *See supra*, at 14. And, of course, Mr. Hernandez, who has not been convicted of anything, is entitled to the presumption of innocence.

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<sup>36</sup> At the January 9, 2019 bail hearing, the government also relied on its assertion that it expected to obtain additional surveillance video supporting its claim that Mr. Hernandez was "frequently at the diner [where drugs were sold] and frequently engaged in narcotics sales." Dkt. No. 87, at 8-9. We have found no such evidence among the discovery materials provided to us by the government.

3. Conditions of Release

We anticipate that the government will claim that the conditions of release we are proposing are insufficient, and that the shelter system may not protect his health more effectively than the prisons. In a perfect world, we would be able to offer Mr. Hernandez's daughters or other family members as co-signers, and designate a family residence where he will reside. But the world we are living in right now is far from perfect, and we are in the midst of a crisis unprecedented in our history. If Mr. Hernandez is released and we are able to speak with him at length, we are hopeful that we will be able to contact his daughters or other family members and find better living arrangements. Right now, the best available option – the only option that protects Mr. Hernandez's rights and is consistent with the public health mandate to reduce the prison population by releasing non-violent, at-risk inmates – is to release Mr. Hernandez with the requirement that he reside at a homeless shelter designated by the New York City Department of Homeless Services, until better arrangements can be found. Pretrial Services has the ability to supervise defendants, using GPS location monitoring if necessary, at the city's shelters. During the past two weeks, courts have released non-violent defendants who have no other place to go than into the shelter system. For example:

In *United States v. Almaleh, et al.*, 17-CR-25 (ER), Dkt. Nos. 395-396 (S.D.N.Y. Mar. 24, 2020). Judge Ramos ordered the release from the MDC of two defendants charged with bank fraud, one a 66-year-old man with an undisclosed medical condition, and the other his 54-year-old wife, with no apparent medical issues. (*See* Dkt. No. 391.) Judge Ramos ordered their release, in light of the COVID-19 crisis, on a \$50,000 personal recognizance bond, without co-signers, with location monitoring by Pretrial Services in the shelter system. The court further ordered that the defendants be subject to home detention once they could find a stable residence. Dkt. Nos. 398-401. Judge Ramos agreed to release the defendants – who, like Mr. Hernandez,

did not have the resources to reside elsewhere – to the shelter system, even though, unlike Mr. Hernandez, they had previously violated their bond terms and been remanded into custody for committing perjury and violating a court order. Dkt. No. 59.

In *United States v. Plasencia*, 20-MJ-205 (RML), Dkt. No. 10 (E.D.N.Y. Mar. 23, 2020), the court agreed to release to the shelter system the defendant, who had been arrested and remanded three weeks earlier on charges that he possessed a firearm, having previously been convicted of attempted robbery. The defendant was ordered released on a \$50,000 appearance bond with no co-signors, with the conditions that, among other things, he reside in a city shelter or other residence approved by Pretrial Services, and be subject to a curfew as directed. We understand from defense counsel that the defendant was released, fitted with an electronic bracelet, admitted to the shelter system, and dialed into a status conference held later in the week.

We recognize that the shelter system is not an ideal place to reside during the current crisis. But our discussions with other defense counsel who have had clients released there in recent weeks and with a social worker at the Federal Defenders who is familiar with the conditions in the shelter system confirm to us that it is superior to the MCC. We understand that the Department of Homeless Services has identified 500 units, separate from the general homeless population, that can be used to quarantine infected patients. The shelter system, which is linked to the city hospital system, has better healthcare and more doctors on hand than the MCC, which has two for the entire institution. While the ability to practice social distancing within a shelter is difficult, it is more easily done there than in the MCC – and after an initial period in a dorm-like setting, persons staying in the shelters are assigned out to more private living quarters. Whatever uncertainty Mr. Hernandez would face in the shelter system has to be

weighed against the near certainty that if he remains in MCC, where two inmates his unit have already tested positive, he will contract COVID-19 and run a high risk of serious illness or death.

Finally – but critically – if Mr. Hernandez is released into a shelter, he will be able to communicate with counsel freely, and will not remain incarcerated if the proceedings in this matter are delayed as a result of the crisis, as they will likely be in most cases. With greater access to Mr. Hernandez, we are hopeful that we will be able to work with him to more readily locate his family and friends, and quickly find more permanent accommodations.

### **CONCLUSION**

For the foregoing reasons, we respectfully request that Mr. Hernandez be released on a personal recognizance bond until the COVID-19 crisis abates. Upon release, we propose that Mr. Hernandez would report directly to the intake unit for homeless men operated by the New York City Department of Homeless Services at 400 East 30th Street, and be supervised by Pretrial Services within the shelter system until other arrangements can be found.

In light of the COVID-19 crisis and the imminent risk it poses to Mr. Hernandez's health, we ask that the Court either release Mr. Hernandez or hold a hearing as soon as possible, and consent to appearing by teleconference.

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March 28, 2020

Respectfully submitted,

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