

**Federal Defenders
OF NEW YORK, INC.**

Southern District
52 Duane Street-10th Floor, New York, NY 10007
Tel: (212) 417-8700 Fax: (212) 571-0392

David E. Patton
Executive Director
and Attorney-in-Chief

Southern District of New York
Jennifer L. Brown
Attorney-in-Charge

March 25, 2020

BY ECF

The Honorable Sidney S. Stein
United States District Judge
Southern District of New York
500 Pearl Street
New York, NY 10007

**RE: United States v. David Smith
07 Cr. 453 (SHS)**

Dear Judge Stein:

By Order issued today, the Court adjourned the sentencing in the above captioned matter from the originally scheduled date of April 2, 2020 to June 4, 2020. ECF No. 349. I write to respectfully request that the Court consider proceeding with the sentencing via remote video conferencing as soon as the technology is available in SDNY. Until that time, I respectfully move this Court for an order granting Mr. Smith's release pending sentencing or, in the alternative, a bail hearing to be held as soon as possible. In light of the current national health emergency and the recent positive case of COVID-19 at the MCC where Mr. Smith is being held, continued incarceration places Mr. Smith's physical health in great peril.

The Court has the authority to release a defendant pending sentencing if it finds by "clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released." 18 U.S.C. §3143(a). Regarding bail, I request that Mr. Smith be released on his own signature to reside in New Berlin, Wisconsin with his sister, Vickie Harris, under the following conditions:

1. Home confinement with electronic monitoring.
2. Surrender of travel documents.
3. Travel restricted to the Eastern District of Wisconsin and the Southern District of New York and points in between for purposes of travel to and from the SDNY.
4. Supervision by Pretrial Services in the Eastern District of Wisconsin.

I. Mr. Smith does not pose a risk of flight or a danger to the community.

If released, Mr. Smith will reside with his sister in her home in Wisconsin. At 63 years old, Mr. Smith falls into one of the two groups that the Centers for Disease Control have identified

as having a higher risk of contracting and succumbing to COVID-19: adults over 60 years old and people with chronic medical conditions. COVID-19 is more dangerous to persons in these high-risk groups than to the general population. Older people who contract COVID-19 are more likely to die than people under the age of 60.¹ This fact alone militates against a likelihood to flee and a risk of danger to the community. The coronavirus pandemic insures that Mr. Smith will remain home where his health will not be placed at risk.

Mr. Smith was arrested in Canada on May 31, 2019 and first appeared in SDNY on July 11, 2019. He has been incarcerated a total of 307 days. He is facing a maximum sentence of 3 years. Even if the Court were to impose the maximum sentence allowable, it is hardly the type of sentence one would flee from especially with close to a year already served. Furthermore, Mr. Smith will likely serve any sentence the Court imposes in a low security facility, likely a federal prison camp. And, given his age, Mr. Smith will undoubtedly be eligible for early release programs under the First Step Act.

The allegations in this case stem from behavior that occurred nearly 20 years ago. In the years that followed, Mr. Smith lived a law abiding life, thereby demonstrating by overwhelming evidence that he does not “pose a danger to the safety of any other person or the community.”

The combination of the aforementioned factors provides clear and convincing evidence that Mr. Smith is not likely to flee or to pose a danger to the safety of another person or the community.

II. The COVID-19 outbreak compels Mr. Smith’s release.

We are facing a serious and urgent public health crisis. On March 11, 2020, the World Health Organization officially classified COVID-19, a new strain of coronavirus, as a global pandemic.² On January 21, 2020, Washington State announced the first confirmed case of coronavirus in the United States.³ Only two months later, COVID-19 has infected over 33,018 people across the United States, leading to at least 428 deaths.⁴

The exponential rate of coronavirus infection is unparalleled. The first case of coronavirus in New York State was announced on March 1, 2020. Less than two weeks later, New York State reported 325 positive cases. To date, the state has amassed nearly 30,000 confirmed cases of the virus,⁵ with 210 deaths.⁶ In a five-day period between March 15 and March 20, New York State experienced a 1,064% increase in new confirmed cases of COVID-

¹ <https://www.worldometers.info/coronavirus/coronavirus-age-sex-demographics/>

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

³ *First Patient With Wuhan Coronavirus Is Identified in the U.S.*, The New York Times (Jan. 21, 2020), at <https://www.nytimes.com/2020/01/21/health/cdc-coronavirus.html>.

⁴ *Coronavirus Map: Tracking the Spread of the Outbreak*, The New York Times (Mar. 21, 2020), at <https://nyti.ms/2U4kmud> (updating regularly).

⁵ <https://www.nytimes.com/2020/03/25/nyregion/coronavirus-new-york-update.html>

⁶ <https://www.nytimes.com/2020/03/25/nyregion/coronavirus-nyc.html>.

19.⁷ As of March 21, 2020 in New York City, there are 8,115 positive cases and 60 deaths resulting from the virus.⁸ Ten days ago, New York City had only 53 confirmed cases.⁹ New York now has more confirmed cases of coronavirus than any other state in the country. In fact, New York has 5% of coronavirus cases nationwide.¹⁰ And the majority of those cases are in New York City, making it an epicenter of the pandemic.¹¹

In response to this public health crisis, Governor Andrew Cuomo declared a State of Emergency in New York State on March 7, 2020.¹² Mayor Bill de Blasio declared a State of Emergency in New York City on March 12, 2020, banning gatherings of over 500 people.¹³ On March 20, 2020, Governor Cuomo directed all non-essential workers to work from home, requiring individuals to maintain 6 feet of distance between each other.¹⁴ The same day, the Federal Emergency Management Agency (FEMA) declared New York “a major disaster.”¹⁵

While adults over sixty years old and people with chronic medical conditions are at heightened risk for COVID-19, young, otherwise healthy individuals are not immune from infection. Data from the Centers for Disease Control and Prevention (CDC) shows that nearly 40% of patients hospitalized from coronavirus were 20 to 54 years old.¹⁶ In New York, 18- to 49-year-olds comprise more than half of all cases in the state.¹⁷ With thousands of confirmed cases in New York City that indicate community spread, we must take every necessary action to

⁷ *Watch How the Coronavirus Spread Across the United States*, The New York Times (Mar. 21, 2020), at <https://www.nytimes.com/interactive/2020/03/21/us/coronavirus-us-cases-spread.html>.

⁸ *Coronavirus*, New York City Health (Mar. 21, 2020), at <https://on.nyc.gov/39ME7wU> (updating regularly).

⁹ *Id.*

¹⁰ *Coronavirus Live Updates*, The New York Times (Mar. 22, 2020) at <https://www.nytimes.com/2020/03/22/world/coronavirus-updates-world-usa.html> (updating regularly).

¹¹ *Coronavirus in N.Y.C.: Region Is Now an Epicenter of the Pandemic*, The New York Times (Mar. 23, 2020), at <https://www.nytimes.com/2020/03/22/nyregion/Coronavirus-new-York-epicenter.html?action=click&module=Spotlight&pgtype=Homepage>.

¹² *At Novel Coronavirus Briefing, Governor Cuomo Declares State of Emergency to Contain Spread of Virus*, New York State (Mar. 11, 2020) at <https://on.ny.gov/2TKzloz>.

¹³ *DeBlasio Declares State of Emergency in NYC, and Large Gatherings Are Banned*, The New York Times (Mar. 12, 2020).

¹⁴ *Novel Coronavirus (COVID-19)*, New York State Department of Health (Mar. 21, 2020), at <https://on.ny.gov/2vffQvy> (updating regularly).

¹⁵ *President Donald J. Trump Approves Major Disaster Declaration for New York*, FEMA (Mar. 20, 2020), at <https://www.fema.gov/news-release/2020/03/20/president-donald-j-trump-approves-major-disaster-declaration-new-york>.

¹⁶ *Younger Adults Make Up Big Portion of Coronavirus Hospitalizations in U.S.*, The New York Times (Mar. 20, 2020), at <https://www.nytimes.com/2020/03/18/health/coronavirus-young-people.html>.

¹⁷ *Coronavirus Live Updates*, The New York Times (Mar. 22, 2020) at <https://www.nytimes.com/2020/03/22/world/coronavirus-updates-world-usa.html> (updating regularly).

protect vulnerable populations and the community at large.

a. Conditions of pretrial confinement create the ideal environment for the transmission of coronavirus.

“Prisons are petri dishes for contagious respiratory illnesses.”¹⁸ Inmates cycle in and out of Bureau of Prisons (BOP) pretrial facilities from all over the world and the country, and people who work in the facilities leave and return daily, without screening or testing. **On March 21, 2020, an inmate at Metropolitan Detention Center (MDC) tested positive for the coronavirus.**¹⁹ The individual “complained of chest pains on Thursday, a few days after he arrived at the facility.”²⁰ When he first arrived at the facility, according to authorities, he was asymptomatic. The effect on the population at MDC remains to be seen, but as the chief physician at Rikers Island cautioned, “A storm is coming.”²¹ **And on March 23, 2020, an inmate at Metropolitan Correctional Center tested positive for the coronavirus.**²²

Given what we know about COVID-19, the BOP’s quest to contain the infection seems futile. Coronavirus is highly contagious. On average, one person with the coronavirus will infect between two to three other individuals.²³ But public health experts agree that 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.”²⁴

Internationally, prisons have proven ripe for the rapid spread of COVID-19. In China, officials confirmed 500 cases of coronavirus in prisons.²⁵ Courts across Iran have granted 54,000

¹⁸ *Letters to the Editor: A prison doctor’s stark warning on coronavirus, jails and prisons*, Los Angeles Times (Mar. 20, 2020), at <https://www.latimes.com/california/story/2020-03-20/prison-doctors-stark-warning-on-coronavirus-and-incarceration>. See also Joseph A. Bick (2007). Infection Control in Jails and Prisons. *Clinical Infectious Diseases* 45(8):1047-1055, at <https://doi.org/10.1086/521910>.

¹⁹ *Ist fed inmate tests positive for coronavirus*, A.P. News (Mar. 21, 2020), at <https://apnews.com/ec49cc7f4d1b00bc5010dfb6d935e042>.

²⁰ *Id.*

²¹ *‘A Storm Is Coming’: Fears of an Inmate Epidemic as the Virus Spreads in the Jails*, The New York Times (Mar. 21, 2020), at <https://www.nytimes.com/2020/03/20/nyregion/nyc-coronavirus-rikers-island.html>.

²² https://www.vice.com/en_us/article/v74nbd/new-york-prison-that-held-el-chapo-and-jeffrey-epstein-now-has-a-coronavirus-case

²³ *The average coronavirus patient infects at least 2 others, suggesting the virus is far more contagious than flu*, Business Insider (Mar. 17, 2020), at <https://www.businessinsider.com/coronavirus-contagious-r-naught-average-patient-spread-2020-3>.

²⁴ “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,” (Mar. 2, 2020), at <https://bit.ly/2W9V6oS>.

²⁵ Rhea Mahbubani, *Chinese Jails Have Become Hotbeds of Coronavirus As More Than 500*

inmates furlough as part of the measures to contain coronavirus across the country.²⁶ 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.”²⁷

On March 20, 2020, the New York City Department of Correction announced that one inmate and seven staff members in the city jails had been diagnosed with coronavirus.²⁸ One day later, on March 21, 2020, it became clear that no fewer than 38 people have tested positive.²⁹ At least 58 additional people are being held in contagious disease and quarantine units in the city’s jail system.³⁰ But the cases are not abating. The chairwoman of the New York City Board of Correction urged, “The best path forward to protecting the community of people housed and working in the jails is to rapidly decrease the number of people housed and working in them.”³¹

b. The MCC remains unprepared for a coronavirus outbreak.

Inmates at the MCC—a massive pretrial detention facility housing approximately 700 people—are at serious risk of contracting the virus.³² The medical care at the MCC has repeatedly failed to adequately address even routine medical conditions,³³ in times of crisis, the medical care at the facility has halted entirely.³⁴

Cases Have Erupted, Prompting the Ouster of Several Officials, Business Insider (Feb. 21, 2020), at <https://bit.ly/2vSzSRT>.

²⁶ Claudia Lauer and Colleen Long, *US Prisons, Jails On Alert for Spread of Coronavirus*, The Associated Press (Mar. 7, 2020), at <https://apnews.com/a98b0a38aaabedbc059092db356697>.

²⁷ 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>.

²⁸ *38 positive for coronavirus in NYC jails, including Rikers*, ABC News (Mar. 21, 2020), at <https://abcnews.go.com/US/wireStory/38-positive-coronavirus-nyc-jails-including-rikers-69731911>.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² See Exhibit A, Affidavit of Jonathan Giftos, M.D.

³³ E.g., *National Association of Women Judges (NAWJ) Women in Prison Committee (WIP) Second Visit to BOP’s Metropolitan Detention Center (MDC), Brooklyn, New York, June 3, 2016*, at <https://bit.ly/39JRhdW>.

³⁴ During a recent eight-day lockdown at the MCC, inmates on one unit reported having been forced to share one toilet, one shower, and one sink among twenty-six people, and were 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.

On March 13, 2020, nearly two weeks after the first confirmed case of coronavirus in New York State, the Bureau of Prisons announced a 30-day suspension of all visits to all federal correctional facilities. But prohibiting visits to correctional facilities is insufficient to stem the spread of illness. “[T]here is no way to stop the daily flow of guards, teachers, food service and healthcare workers. Someone is certain to bring the virus in and take it back out while they are asymptomatic.”³⁵

Because there is currently no vaccine or cure for COVID-19, the primary focus is on preventing the spread of the virus. To prevent new infections, the CDC strongly recommends the following actions: thorough and frequent handwashing, cleaning surfaces with Environmental Protection Agency approved disinfectants, keeping at least 6 feet of space between people, and social distancing.³⁶

To date, the MCC has not met even the most basic recommendations of the CDC for preventing the spread of coronavirus. Maintaining six feet of distance from other inmates is all but impossible in a correctional facility where most individuals, including David Smith, are double-bunked in a single cell, sharing a toilet and sink with a cellmate and a common shower with at least sixteen other people. In the days since March 13, the MCC has issued hand soap to inmates only two times. Because commissary is currently closed, this soap must be used not only for handwashing, but also for showers and washing clothing; no one is allowed to purchase additional soap.

In addition to unhygienic living conditions, frequent movement between units at the MCC over the past several weeks promises to aid the spread of the virus. In New York City jails, where there have been at least 38 confirmed cases of coronavirus, the Board of Correction chairwoman stated, “It is likely that these people have been in hundreds of housing areas and common areas over recent weeks and have been in close contact with many other people in custody and staff.”³⁷ The MCC will encounter the same obstacle to cabining the spread. For eight days at the end of February through the beginning of March, the MCC was on total lockdown. During that period, inmates report that they were frequently shuttled among various housing units as officers searched for a loaded gun. This movement promises to facilitate infection at the MCC.

With each additional arrest comes increased risk of spreading the virus in MCC. Individuals who are newly arrested and potentially exposed to coronavirus, if they are not symptomatic, will be brought into the facility. There, they are held with the existing population, potentially transmitting COVID-19 to a populace held in close quarters with unsanitary conditions. These conditions are ripe for the spread of infection: The individual who tested

³⁵ *Letters to the Editor: A prison doctor’s stark warning on coronavirus, jails and prisons*, Los Angeles Times (Mar. 20, 2020), at <https://www.latimes.com/california/story/2020-03-20/prison-doctors-stark-warning-on-coronavirus-and-incarceration>.

³⁶ Exhibit A, Affidavit of Jonathan Giftos, M.D.

³⁷ *38 positive for coronavirus in NYC jails, including Rikers*, ABC News (Mar. 21, 2020), at <https://abcnews.go.com/US/wireStory/38-positive-coronavirus-nyc-jails-including-rikers-69731911>.

positive for coronavirus at the MDC on March 21 first became incarcerated only a few short days before becoming symptomatic.³⁸

Despite a new positive coronavirus test, the MCC remains unprepared for an inevitable outbreak. The facility does not currently have the ability to test for coronavirus and there are no general screening protocols in place. Only if an inmate self-reports symptoms will they be screened for the virus. If symptomatic, the inmate will be “isolated” in their cell, exposing their cellmate to risk.

c. The federal judiciary has begun to set bail conditions for previously detained individuals in light of the coronavirus.

The judiciary has recently begun to recognize and address this exceptional crisis. On March 12, 2020, Magistrate Judge Orenstein denied a remand application, holding that increasing the population of the Metropolitan Detention Center could present a “danger to the community”—the staff and inmates inside the jail—by potentially bringing the virus into the facility. *United States v. Raihan*, 20-CR-68 (BMC) (Mar. 12, 2020). A week later, conditions worsened exponentially.

On March 19, 2020, thirteen days after having remanded defendant Dante Stephens, Judge Nathan reversed herself “in light of circumstances that have changed since the March 6 hearing,” namely, “the unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic.” *United States v. Stephens*, 15-CR-95 (AJN) (Mar. 19, 2020). In setting bail, Judge Nathan noted that “[a] comprehensive view of the danger the Defendant poses to the community requires considering all factors,” including COVID-19. *Id.* Similarly, on March 19, 2020, the threat of coronavirus led Judge Ramos to release a formerly detained individual on bail. *See United States v. Santiago Ramos*, 20-CR-04 (ER).

In the throes of this public health crisis, the Court must release David Smith to protect his physical health.

d. Mr. Smith’s physical health is at risk.

Mr. Smith’s age alone places him at great risk of contracting and succumbing to COVID-19. Because of the prison lockdown, I have had limited ability to communicate with Mr. Smith but I received news today that his housing unit is in quarantine.

In addition to the grave concern for his health due to the coronavirus, since his incarceration, Mr. Smith has not received adequate nutrition. He suffers from celiac disease which the MCC is ill prepared to accommodate. Now that the prison is in lockdown, without access to commissary or the kitchen where he worked, Mr. Smith has no ability to purchase food or prepare his own meals. He has lost 20 pounds since his incarceration.

Additionally, Mr. Smith has been suffering with a hernia for several weeks and has

³⁸ *1st fed inmate tests positive for coronavirus*, A.P. News (Mar. 21, 2020), at <https://apnews.com/ec49cc7f4d1b00bc5010dfb6d935e042>.

sought and been denied medical treatment on multiple occasions. His wellbeing diminishes daily, making him more and more susceptible to contracting COVID-19.

Conclusion

Mr. Smith does not present a risk of flight nor a danger to the community. Our country is in the throes of a public health emergency. The Court cannot ignore the substantial threat incarceration poses to Mr. Smith's physical well-being. Accordingly, I respectfully request that the Court issue an order releasing Mr. Smith on bail. In the alternative, I respectfully request a bail hearing for Mr. Smith.

Thank you for your consideration of this matter.

Respectfully submitted,

/s/
Amy Gallicchio
Assistant Federal Defender
(212) 417-8728

cc: AUSA Timothy Capozzi