

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA

v.

JOSHUA RISARD GRAVES

Case No. 1:16CR299-1

**EMERGENCY MOTION FOR
IMMEDIATE RELEASE AND
MEMORANDUM IN SUPPORT**

NOW COMES JOSHUA RISARD GRAVES, by and through undersigned counsel, and respectfully moves this Court pursuant to 18 U.S.C. § 3143 and Federal Rules of Criminal Procedure 32.1 and 46 for immediate release in light of the increasingly dire COVID-19 coronavirus pandemic.

The undersigned has conferred with counsel for the government, who advises that the government opposes this Motion.

PRELIMINARY STATEMENT

This is not an ordinary request or one counsel anticipated making, given that he was preparing to appear for Mr. Graves's revocation hearing currently scheduled for April 6, 2020. However, I am duty-bound to request this extraordinary relief based on the exigencies of the current situation.

Mr. Graves's release is warranted because the conditions of confinement at the Forsyth County Detention Center are very likely to constitute a humanitarian crisis when the virus is introduced to the facility. Further, while we do not dispute the accuracy or seriousness of the violations, Mr. Graves's

failure to remain in contact with Probation and make timely restitution payments cannot justify his continued incarceration in light of the virus.

ARGUMENT

I. THE CONDITIONS OF CONFINEMENT AT THE FORSYTH COUNTY DETENTION CENTER ARE VERY LIKELY TO CONSTITUTE A HUMANITARIAN CRISIS WHEN THE VIRUS IS INTRODUCED TO THE FACILITY

Mr. Graves faces the grim threat of coronavirus within the detention center's walls. As of March 19, 2020, the new strain of coronavirus, which causes COVID-19, has infected over 222,600 people, leading to at least 9,115 deaths worldwide.¹ On March 11, 2020, the World Health Organization officially classified COVID-19 as a pandemic.² Governor Cooper has declared a State of Emergency, closed all public schools, banned gatherings of more than

¹ Center for Systems Science and Engineering at Johns Hopkins University, Coronavirus COVID-19 Global Cases Dashboard (Mar. 19, 2020), at <https://gisanddata.maps.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6>.

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

100 people, and shuttered dine-in restaurants and bars.³ President Trump has advised limiting gatherings to ten people.⁴

Mr. Graves and his fellow inmates will be particularly vulnerable “when, not if” coronavirus comes to the Forsyth County Detention Center,⁵ an “incubator” for the disease⁶ with “petri-like-conditions.”⁷ Conditions of pretrial

³ *Governor Cooper Declares State of Emergency to Respond to Coronavirus COVID-19* (Mar. 10, 2020), at <https://governor.nc.gov/news/governor-cooper-declares-state-emergency-respond-coronavirus-covid-19>; Executive Order No. 117 (Mar. 14, 2020), at <https://files.nc.gov/governor/documents/files/EO117-COVID-19-Prohibiting-Mass-Gathering-and-K12-School-Closure.pdf>; Executive Order No. 118 (Mar. 17, 2020), at <https://files.nc.gov/governor/documents/files/EO118.pdf>.

⁴ *Gatherings Should be Limited to 10 People, Trump Says*, N.Y. TIMES (Mar. 16, 2020), at <https://www.nytimes.com/2020/03/16/world/live-coronavirus-news-updates.html>.

⁵ Rich Schapiro, *Coronavirus Could ‘Wreak Havoc’ on U.S. Jails, Experts Warn*, NBC NEWS (Mar. 12, 2020), <https://www.nbcnews.com/news/us-news/coronavirus-could-wreak-havoc-u-s-jails-experts-warn-n1156586> (“We’re in a very perilous stage right now,” said Dr. Homer Venters, the former chief medical officer of the New York City jail system. “It’s just a matter of time before we see cases inside jails and prisons.”).

⁶ Martin Kaste, *Prisons and Jails Worry About Becoming Coronavirus ‘Incubators’*, NPR (Mar. 13, 2020), <https://www.npr.org/2020/03/13/815002735/prisons-and-jails-worry-about-becoming-coronavirus-incubators>.

⁷ P. Leila Barghouty, *U.S. Prisons Are Not Ready for Coronavirus*, THE OUTLINE (Mar. 6, 2020), <https://theoutline.com/post/8770/prison-coronavirus-covid-19-outbreak?zd=1&zi=oixu2i52>; see also Kaiser Health News, *Could Coronavirus Cause a National Prison Lockdown?*, U.S. NEWS & WORLD REPORT (Mar. 13, 2020), at <https://www.usnews.com/news/healthiest-communities/articles/2020-03-13/could-coronavirus-cause-a-national-prison-lockdown> (“Though small by comparison, the federal system sheds light on issues many state, county and local officials are grappling with now. Because

confinement create the ideal environment for the transmission of contagious disease.⁸ Inmates cycle in and out of pretrial facilities from all over the state and the country, and people who work in the facilities leave and return daily, without screening. Incarcerated people have poorer health than the general population, and even at the best of times, medical care is limited in detention centers.⁹ Many people who are incarcerated also have chronic conditions, like diabetes or HIV, which makes them vulnerable to severe forms of COVID-19. According to public health experts, incarcerated individuals “are at special risk of infection, given their living situations,” and “may also be less able to

the facilities are typically dense and crowded, they could become prime breeding grounds for the highly contagious coronavirus.”); Chris Strohm, *Prisons’ Coronavirus Risk Puts Justice Department Under Pressure*, BLOOMBERG (Mar. 12, 2020) (noting concerns that coronavirus outbreak “could spark riots”); Courtney Bubl , *Federal Prison Employees and Others Question BOP’s Readiness for Coronavirus*, GOV. EXEC. (MAR. 11, 2020), <https://www.govexec.com/management/2020/03/federal-prison-employees-and-others-question-bops-readiness-coronavirus/163692/> (“History has shown time and time again that the Federal Bureau of Prisons has never been a proactive agency, but instead a reactive agency.”); Joshua Eaton, *Federal Prisons Don’t Have Coronavirus Test Kits for Inmates*, ROLL CALL (Mar. 6, 2020), at <https://www.rollcall.com/2020/03/06/federal-prisons-dont-have-coronavirus-test-kits-for-inmates/> (“Federal prisons, whose inmates may be a high-risk population for a coronavirus outbreak, do not have kits to test for the disease available.”).

⁸ Joseph A. Bick (2007). Infection Control in Jails and Prisons. *Clinical Infectious Diseases* 45(8):1047-1055, at <https://doi.org/10.1086/521910>.

⁹ Laura M. Maruschak et al. (2015). Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-12. NCJ 248491. Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, at <https://www.bjs.gov/content/pub/pdf/mpsfj1112.pdf>

participate in proactive measures to keep themselves safe”; “infection control is challenging in these settings.”¹⁰ Outbreaks of the flu regularly occur in jails, and during the H1N1 epidemic in 2009, many jails and prisons dealt with high numbers of cases.¹¹ In China, officials have confirmed the coronavirus spreading at a rapid pace in Chinese prisons, totaling 555 cases as of three weeks ago.¹² 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.”¹³ Courts across Iran have granted 54,000 inmates furlough as part of the measures to contain coronavirus across the country.¹⁴ And deadly prison riots have broken out in Italy over fears of the

¹⁰ “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,” (March 2, 2020), at <https://bit.ly/2W9V6oS>.

¹¹ *Prisons and Jails are Vulnerable to COVID-19 Outbreaks*, THE VERGE (Mar. 7, 2020), at <https://bit.ly/2TNcNZY>.

¹² Alice Su and Emily Baumgartner, *They Were Already in China’s Prisons. Now the Coronavirus is There, Too*, LOS ANGELES TIMES (Feb. 28, 2020), at <https://www.latimes.com/world-nation/story/2020-02-28/lawyers-activists-pastors-uighurs-families-of-detainees-in-china-fear-coronavirus-spread-outbreak-in-camps-and-prisons>. See also Rhea Mahbubani, *Chinese Jails Have Become Hotbeds of Coronavirus As More Than 500 Cases Have Erupted, Prompting the Ouster of Several Officials*, BUSINESS INSIDER (Feb. 21, 2020) at <https://bit.ly/2vSzSRT>.

¹³ 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>.

¹⁴ Claudia Lauer and Colleen Long, *US Prisons, Jails On Alert for Spread of*

virus's spread through overcrowded facilities.¹⁵ Because of the increased risks posed to prisoners, District Attorneys in New York and California have sought or agreed not to oppose the release of vulnerable inmates and those facing low-level charges.¹⁶

The 700 plus detainees at the Forsyth County Detention Center face especially high risk. The majority of the individuals imprisoned there are housed in small four-man cells with a shared toilet and sink, and eat meals and have recreation with the other members of their 64-person pods. The medical care at the Forsyth County Detention Center has been so bad in recent years that it has spawned multiple investigations into medical-related deaths

Coronavirus, The Associated Press (Mar. 7, 2020), at <https://apnews.com/af98b0a38aaabedbc059092db356697>.

¹⁵ *Death Toll Rises from Italy's Coronavirus Prison Riots*, REUTERS (Mar. 10, 2020), at <https://www.reuters.com/article/us-health-coronavirus-italy-prisons/death-toll-rises-from-italy-coronavirus-prison-riots-idUSKBN20X2DG>.

¹⁶ *CORONAVIRUS: SENTENCED TO COVID-19*, THE DAILY APPEAL (Mar. 12, 2020), at <https://theappeal.org/sentenced-to-covid-19/> (reporting that Brooklyn's District Attorney has asked New York Governor Andrew Cuomo to grant emergency clemency to elderly and sick prisoners); Darwin Bond Graham, *San Francisco Officials Push to Reduce Jail Population to Prevent Coronavirus Outbreak*, THE DAILY APPEAL, at <https://theappeal.org/coronavirus-san-francisco-reduce-jail-population/> (Mar. 11, 2020) (reporting that San Francisco's District Attorney has instructed prosecutors not to oppose motions for release of pre-trial detainees facing misdemeanor or drug-related felony charges unless they pose a danger to public safety).

of inmates.¹⁷ These dangerous conditions exacerbate what is already a frightening and dire situation for the general population, and raise constitutional concerns of cruel and unusual punishment, especially for prisoners who are at greater risk of contracting lethal infections like the novel coronavirus due to factors such as age or pre-existing medical conditions. *See Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976) (“[D]eliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment.” (citation and internal quotation marks omitted)).

The danger of contagion spreading throughout the jail and prison populations is so severe that the Federal Bureau of Prisons has suspended all visits—including legal visits—for 30 days,¹⁸ North Carolina’s jails have suspended social visits for 30 days,¹⁹ and undersigned counsel has learned that

¹⁷ *See, e.g.*, Jordan Green, *Recent Deaths Call Attention to Medical Care in Forsyth County*, Triad City Beat (Jun. 7, 2017), at <https://triad-city-beat.com/recent-deaths-call-attention-medical-care-forsyth-jail/> (reporting on medical-related deaths in September 2014, August 2015, and two in May 2017).

¹⁸ *Federal Bureau of Prisons COVID-19 Action Plan*, at https://www.bop.gov/resources/news/20200313_covid-19.jsp.

¹⁹ Jamie Markham, *The Correctional System Responds to COVID-19*, UNC SCH. OF GOV’T (Mar. 16, 2020), at <https://nccriminallaw.sog.unc.edu/the-correctional-system-responds-to-covid-19-and-some-preliminary-thoughts-on-minimizing-correctional-interactions/>.

the Middle District of North Carolina Federal Defenders have been instructed not to visit any of their clients until further notice.

II. WHILE WE DO NOT DISPUTE THE ACCURACY OF THE VIOLATIONS, MR. GRAVES'S FAILURE TO REMAIN IN CONTACT WITH PROBATION AND MAKE TIMELY RESTITUTION PAYMENTS CANNOT JUSTIFY HIS CONTINUED INCARCERATION IN LIGHT OF THE VIRUS

Continuing to incarcerate Mr. Graves in “petri-like-conditions” during the COVID-19 pandemic is neither necessary nor appropriate to sanction his relatively minor technical violations, particularly where he has already served a sentence almost as long as the low end of the recommended guidelines range.

Mr. Graves is in custody because he temporarily left his home and work, stopped reporting to Probation, and stopped making timely restitution payments. *See* ECF No. 30. He does not dispute the accuracy of these violations, or their seriousness. He understands that he cannot remain on supervised release if he cannot be supervised, and he cannot be supervised if he does not tell Probation where he is. Nevertheless, Mr. Graves’s failure to adhere to these conditions of release cannot justify his continued incarceration in light of the virus.

It is important to put Mr. Graves’s custody in context. He is not being held on the underlying offenses. Those were very serious felonies—four bank robberies—and they absolutely put the public at risk. But Mr. Graves accepted responsibility for his actions, pleaded guilty, and served the 36 months

imprisonment ordered by the Court. He also is not being held because he did something that would mandate revocation of his supervised release. He did not commit another robbery, possess a gun, get arrested, or even fail a drug test. *Cf.* 18 U.S.C. § 3583(g).

Rather, after successfully reintegrating into the community, finding gainful employment, passing all drug screens, paying restitution as ordered for six months, and appearing “motivated to be successful on supervision,” ECF No. 31, he temporarily left his home and work to stay with a cousin nearby.²⁰ Having left his home, he did not report his whereabouts to Probation and, having left his job and lost his source of income, he did not make further restitution payments. Woefully, Mr. Graves did not report to Probation or resume restitution payments even after he returned home and started working again some two months later.

Mr. Graves’s violations, while serious, are “technical” in nature. *See* U.S. SENTENCING GUIDELINES Ch. 7, Pt. A(4) (2018). The Court has discretion whether to revoke his release or continue his supervision. 18 U.S.C. § 3583. Even if it were to revoke his release, the Sentencing Guidelines would recommend a sentence of three to nine months on each violation, to run

²⁰ All factual representations made herein are supported by the uncontested testimony of Mr. Graves’s parents during his preliminary hearing on January 16, 2020. Due to the emergency nature of this Motion, counsel has not sought a transcript of that proceeding.

concurrently. *See* U.S.S.G. § 7B1.4; U.S.S.G. § 5G1.2(c). *Cf.* U.S.S.G. §§ 5G1.3, 7B1.3(f) (recommending consecutive sentences for revocation violations and criminal acts that constitute the violation). Mr. Graves already has served two months and ten days since his arrest on January 9, 2020, and will have served nearly three months by the current date of his revocation hearing, April 6, 2020. Should his hearing be postponed in light of the Court’s Standing Order 13—either past April 16, 2020, or into May, as undersigned counsel understands is being done for many criminal hearings—Mr. Graves will have served more time than the low end of the guidelines range before the Court even determines whether revocation is warranted. Immediate release thus would protect against Mr. Graves over-serving any sentence to be imposed. *Accord* Standing Order 13 (M.D.N.C. Mar. 16, 2020) (“Exceptional cases that may be considered for exemption from a continuance include those where a defendant may be considered to have served or over-served sentence.”).

Moreover, as counsel intends to argue and establish at the revocation hearing, release and continuation of supervision are appropriate here:

- Mr. Graves initially was succeeding on release. He was living with his parents and had found steady employment with his father’s company. As ordered by the Court, he made six monthly restitution payments of \$500 each. In fact, he was doing so well that his probation officer ceased requiring regular meetings.
- Mr. Graves’s violations all stemmed from a brief period of time when he left his home and his job to stay with a cousin in High

Point. He did not inform his parents or Probation where he was, and he stopped working or paying restitution.

- However, Mr. Graves returned to his home and to his job approximately two months later—curing two of the violations on his own. Regrettably, Mr. Graves did not inform Probation he had done so, reestablish contact with his probation officer, or resume restitution payments.
- Release will not endanger the community. After returning home, until his arrest four months later, Mr. Graves continued to live a law-abiding and productive life, working and staying out of trouble. At no point during the first year of his release did he reoffend.
- Even though he “absconded” in the legal sense, Mr. Graves did not flee. To the contrary, he continued living in the Middle District; he returned home to his parents’ house two months later; and he never left the state. In fact, Mr. Graves was arrested because he went to the Probation Office to request permission to leave the state to attend his grandmother’s funeral.
- Mr. Graves has loving and supportive parents who will serve as third party custodians and ensure he complies with any and all conditions of release. Both parents have agreed to supervise any conditions imposed, including house arrest—a condition similar to that many are forced into anyway due to the coronavirus. Mr. Graves’s mother was not aware he had violated the terms of his release, despite speaking with the Probation Officer several times after the violations were lodged. Had she known, she would have turned her son in. Indeed, she turned him in on the underlying bank robberies, despite knowing the terrible impact that would have on her son, herself, and her entire family.

In short, this Court should release Mr. Graves from custody and continue his supervision eighteen days from now, whether or not a global coronavirus pandemic threatens catastrophic harm to prison populations. But because the coronavirus poses grave health risks to inmate populations, the Court should

release him *now*. Mr. Graves faces a present and immediate threat from COVID-19 every day he remains in custody. The number of confirmed COVID-19 cases has doubled in two weeks, topping 222,600 globally and leading to 9,115 deaths.²¹ When he is scheduled to appear three weeks from now, assuming similar exponential growth, those numbers could be 650,000 cases and 27,000 deaths. They may be even higher due to the increased prevalence of testing. More importantly, the virus already is knocking on the door of the Forsyth County Detention Center; Forsyth County has multiple reported cases of the virus.²² As stated above, the virus's induction into the detention center, and its rapid spread through the detainee population, is a question of "when, not if."

CONCLUSION

Under the exigent circumstances created by the novel coronavirus and the extraordinary risk it poses to prison populations, this Court should release Mr. Graves immediately, pending his revocation hearing.²³

²¹ *Supra note 1. See also Coronavirus Infections Pass 200,000 Globally*, WALL ST. J. (Mar. 18, 2020), at <https://www.wsj.com/articles/coronavirus-infections-approach-200-000-globally-11584524438>.

²² *North Carolina coronavirus Impact: Latest Information and Helpful Resources*, NBC NEWS, at <https://www.wxii12.com/article/north-carolina-coronavirus-covid-19-information-resources/31405011>.

²³ If the Court is inclined to deny this Motion, counsel respectfully requests that the Court conduct the revocation hearing as scheduled on April 6, by videoconference if necessary.

Respectfully submitted, this the 19th day of March, 2020.

/s/ Daniel Adams
Daniel D. Adams
N.C. State Bar No. 51806
BROOKS, PIERCE, MCLENDON
HUMPHREY & LEONARD, L.L.P.
P. O. Box 26000
Greensboro, NC 27420-6000
(336) 271-3109
(336) 232-9109 (fax)

Attorney for Joshua Risard Graves